

Exhibit 86

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3 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
4 -----X
THE PEOPLE OF THE STATE OF NEW YORK
5 By ANDREW M. CUOMO, Attorney General
of the State of New York,
6
7 - against - Plaintiff, Index No.
450879/2009
8 J. EZRA MERKIN and GABRIEL CAPITAL
CORPORATION,
9 Defendants,
-and-
10
11 ASCOT PARTNERS L.P., ASCOT FUND LIMITED,
GABRIEL CAPITAL L.P., ARIEL FUND LIMITED,
12 GABRIEL ASSETS LLC, and GABRIEL ALTERNATIVE
ASSETS LLC,
Relief Defendants
13 -----X
March 4, 2010
14 10:03 a.m.
15
16
17 CONTINUED EXAMINATION BEFORE TRIAL of
18 Defendant J. EZRA MERKIN, taken by Plaintiff,
19 pursuant to Notice, at the State of New York
20 Office of the Attorney General, 120 Broadway,
21 New York, New York 10271-0332, before Donna
22 A. Metz, a Registered Professional Reporter
23 and Notary Public in and for the State of
24 New York.
25

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13 Q. Well, what is the risk? They could
14 be lost? They could be stolen?

15 what is the risk?

16 A. If you have money in a bank you have
17 risk at the bank, depending on how much it is
18 and what the nature of the risk is.

19 If you own treasuries and they are
20 custodied in a shop that files for bankruptcy,
21 those treasuries could be at risk; could be.

22 Q. Now, is the risk, such as it may be,
23 compounded -- the risk that securities will be
24 lost, stolen or not exist --

25 A. What I was alluding to now and also

□

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1 J. Ezra Merkin
2 yesterday when I talked about 2008, just look
3 at the overnight risk issues that came about
4 in 2008 from Lehman's filing. That's the
5 risk.

6 Q. Is the risk also having an
7 independent -- most investment managers have
8 independent brokers and custodians; correct?

9 It is somewhat unusual for the same
10 investment manager to be also acting as the
11 custodian and prime broker; isn't that true?

12 A. Are you talking about us, now?

13 Q. I am not talking about you.

14 A. Focus me.

15 Q. Is it somewhat unusual for a money
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16 manager to also be acting as the prime broker
17 and custodian?

18 A. If you open an account at Goldman
19 Sachs and you say to Goldman Sachs, whether
20 you give them discretion over that account or
21 whether you retain discretion over that
22 account, you expect that account to be housed
23 and custodied at Goldman Sachs.

24 Any managed account -- I can't say
25 that this is without exception, but the

□

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1 J. Ezra Merkin
2 presumption is that a managed account is
3 custodied at the brokerage firm at which the
4 account is held.

5 Madoff is a registered
6 broker-dealer. He has been a registered
7 broker-dealer under the SEC for decades. He
8 has been vetted by the SEC for decades. This
9 is before we get to his registration as an
10 investment advisor.

11 Accounts held at Madoff are no
12 different than the accounts held at Goldman
13 Sachs, wherein the overnight custody was at
14 Goldman Sachs. It's no different than being
15 held at Morgan Stanley.

16 Q. If Madoff had been acting purely as
17 a broker or later investment advisor with a
18 separate custodian and using a separate

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241428.TXT

19 custodian, this Ponzi scheme would have been
20 impossible; correct?

21 A. It's a speculative answer. I can
22 see why it would have been harder, but you are
23 talking about somebody who pulled off, you
24 know, the swindle of the decade in
25 extraordinarily artful and innovative ways.

□

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1 J. Ezra Merkin

2 For all I know he had accounts that
3 he cleared someplace else, and whether they
4 were part of the swindle or not, I just don't
5 know.

6 Q. If there was an independent
7 custodian or an independent prime broker it
8 would have been impossible for him to have
9 created these confirms and to carry on his
10 Ponzi scheme; isn't that true?

11 MR. ELLENHORN: I will go on to
12 something else.

13 It is withdrawn.

14 MR. LEVANDER: Thank you.

15 Q. Would you look at the document in
16 front of you Bates No. IVYMAC 00085331, dated
17 January 14, 1997.

18 A. I have it. This is 224; right.

19 Q. Exhibit 224.

20 This references a meeting with you.

21 It says, "Meeting with Ezra Merkin FS. PD
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Exhibit 87

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

THE PEOPLE OF THE STATE OF
NEW YORK BY ANDREW M. CUOMO,
ATTORNEY GENERAL OF THE STATE
OF NEW YORK,

Plaintiff,

-against-

Index No.:

450879/2009

ASCOT PARTNERS, LP,
ASCOT FUND LIMITED,
GABRIEL CAPITAL, LLC, and
GABRIEL ALTERNATIVE ASSETS,

Defendants.

-----X

120 Broadway
23rd Floor
New York, New York 10271
July 1, 2010
10:11 a.m.

EXAMINATION BEFORE TRIAL of J. EZRA
MERKIN, a representative of the Defendant in
the above-entitled action, taken on behalf
of the Plaintiff, held at the above time and
place, and taken before Binita Shrestha, a
reporter and Notary Public within and for
the State of New York.

1 J. E. MERKIN

2 about options strategies, and think that I
3 understood what that strategy was, what it
4 purported to be, and how basically it
5 worked.

6 I spent a lot of time doing due
7 diligence on what the strategy was with
8 Mr. Madoff and about Mr. Madoff's firm with
9 others on Wall Street. We had any number of
10 meetings with Mr. Madoff about the options.
11 Even late in the game when we set up
12 meetings for UBP and the fourth quarter of
13 2008, we focused on the options, we focused
14 on how they worked with the stocks, we
15 focused on how the strategy was meant to
16 deliver the kind of return it did. I don't
17 think options were something that were new
18 to me, alien to me, or not understood by me.

19 I think Mr. Madoff's role in the
20 industry, I think Mr. Madoff's stature and
21 his firm's stature were all things we took
22 into account in considering the
23 appropriateness of the strategy.

24 Q. Have you now finished your answer?

25 A. Yes.

Exhibit 88

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

THE PEOPLE OF THE STATE OF
NEW YORK BY ANDREW M. CUOMO,
ATTORNEY GENERAL OF THE STATE
OF NEW YORK,

Plaintiff,

-against-

Index No.:

450879/2009

ASCOT PARTNERS, LP,
ASCOT FUND LIMITED,
GABRIEL CAPITAL, LLC, and
GABRIEL ALTERNATIVE ASSETS,

Defendants.

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22 into account in considering the
23 appropriateness of the strategy.

24 Q. Have you now finished your answer?

25 A. Yes.

Exhibit 89

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AMERICAN ARBITRATION ASSOCIATION
NEW YORK, NEW YORK - COMMERCIAL RULES
-----x
MOSHAEL J. STRAUS,
 Claimant,

 v. Arbitration No.
 13 148 Y 01800 10
J. EZRA MERKIN,
 Respondent.
-----x
 June 21, 2011
 Cravath, Swaine & Moore LLP
 Worldwide Plaza
 825 Eighth Avenue
 New York, New York
 10:05 a.m.

B E F O R E:
WILLIAM A. DREIER, P.J.A.D. (ret.) - The Chairman
THOMAS J. FLEMING, ESQ. - Panel Member
RORY O. MILLSON, ESQ. - Panel Member

Amy Klein Campion - Hearing Reporter

<div data-bbox="493 460 711 532" data-label="Text"><p>REDACTED</p></div>	<div data-bbox="1427 111 1463 137" data-label="Text"><p>44</p></div> <div data-bbox="894 161 1455 941" data-label="Text"><p>1 Merkin - Direct/Bamberger 2 if you can or can't. 3 THE WITNESS: I can't shift 4 down. 5 MR. LEVANDER: Don't fall off 6 the step. 7 THE WITNESS: I can possibly 8 move up the chair. 9 DIRECT EXAMINATION 10 BY MR. BAMBERGER: 11 Q. Mr. Merkin, good morning. 12 A. Good morning. 13 Q. As you know, I'm David Bamberger 14 and I represent the Claimant, Moshael 15 Straus. 16 Sir, when and where were you 17 born? 18 A. I was born in New York City in 19 1953. 20 Q. Where did you go to school as a 21 youth? 22 A. Well, at least starting in high 23 school, I went to a high school called 24 Ramaz School. After that I studied for a 25 few years abroad, went to Columbia College</p></div>
<div data-bbox="834 952 870 978" data-label="Text"><p>43</p></div> <div data-bbox="305 1000 854 1775" data-label="Text"><p>1 Opening Statement - by Claimant 2 THE CHAIRMAN: Thank you. 3 Mr. Bamberger, call your first 4 witness, please. 5 MR. BAMBERGER: Claimant calls 6 Ezra Merkin, your Honor. 7 THE CHAIRMAN: Will you swear 8 the witness. 9 J. E Z R A M E R K I N, 10 called as a witness on behalf of the 11 Claimant, having been first duly affirmed 12 by the Court Reporter, was examined and 13 testified as follows: 14 THE WITNESS: My name is J. Ezra 15 Merkin. I live at 740 Park Avenue, 16 New York, New York 10021. 17 MR. LEVANDER: Mr. Chairman, a 18 question. Logistics here -- it's a 19 beautiful courtroom, I don't fault for 20 that for a second. The sight lines 21 actually aren't so great. 22 If Mr. Merkin can shift a little 23 bit over so I can actually see the 24 witness and I can hear him better, I 25 would be appreciative. I don't know</p></div>	<div data-bbox="1427 952 1463 978" data-label="Text"><p>45</p></div> <div data-bbox="894 1000 1455 1775" data-label="Text"><p>1 Merkin - Direct/Bamberger 2 and then to Harvard Law School. 3 Q. Okay. When you say you studied 4 a few years abroad, where were you? 5 A. I lost the question. 6 MR. BAMBERGER: We'll slow down. 7 Q. When you studied for a few years 8 abroad, where did you study? 9 A. Israel and Europe. 10 Q. Were you in Yeshiva in Israel? 11 A. Yes. 12 Q. What were your years at Columbia 13 College, please? 14 A. I graduated class of 1976. 15 Q. When did you meet Danny Straus? 16 A. I don't remember exactly. 17 Q. Do you recall where you met him? 18 A. No. 19 Q. Do you recall if it was in your 20 college years or later? 21 A. You asked me for the first time, 22 not ever, right? 23 Q. Yes. 24 A. I don't remember the first time 25 I met him.</p></div>

12 (Pages 42 to 45)

<p style="text-align: right;">46</p> <p>1 Merkin - Direct/Bamberger 2 Q. Did you become friends with 3 Danny Straus? 4 A. I became acquainted with Danny 5 Straus. I don't think we're terribly, 6 terribly close. 7 Q. How did you become acquainted 8 with Danny Straus? 9 A. Are you asking me for the first 10 time or over time? 11 Q. Over time. 12 A. Well, over time Danny was in 13 some form a limited partner of ours. And 14 that is, he came to the office a couple of 15 times and we had discussions about the 16 world of money management. We talked a 17 little bit about his business, talked a 18 little bit about his family. Saw him on 19 one occasion or another. 20 Q. An LP of ours, is that a 21 reference to Ascot and Gabriel? 22 A. Might be. 23 Q. Was he an investor with your 24 father before that? 25 A. Was he an investor of...?</p>	<p style="text-align: right;">48</p> <p>1 Merkin - Direct/Bamberger 2 A. I worked at a law firm downtown. 3 Q. Was it Milbank Tweed? 4 A. It was. 5 Q. What were the years? 6 A. '79 to '82. 7 Q. What, briefly, did you do at 8 Milbank? 9 A. I did rotations and spent a fair 10 amount of time focusing on bankruptcy and 11 restructuring work. 12 Q. What did you do after Milbank? 13 A. I joined an investment firm 14 called Halcyon Partners. 15 Q. And for how long were you with 16 Halcyon Partners? 17 A. About three years. 18 Q. Who was its principal? 19 A. A gentleman named Alan Slifka, 20 S-l-i-f-k-a. Middle initial B. 21 Q. What kind of work did you do 22 there? 23 A. I was a research analyst 24 analyzing the investment prospects of 25 various bankruptcy restructurings and</p>
<p style="text-align: right;">47</p> <p>1 Merkin - Direct/Bamberger 2 Q. Was he an investor with your 3 father before that? 4 A. Not that I'm aware of. 5 Q. Do you recall Emmes Partners? 6 A. Do I recall...? 7 Q. Do you recall Emmes Partners? 8 A. M as in Mary -- 9 Q. Emmes as in truth. Emmes 10 Partners. Do you recall that entity? 11 A. Hmmm, not as I sit here today. 12 Q. Do you recall your father being 13 a general partner in something called 14 Emmes Partners? 15 A. I do not. 16 Q. After you graduated college, 17 what did you do? 18 A. After I graduated college I 19 attended law school. 20 Q. That was at Harvard? 21 A. Yes. 22 Q. What were the years? 23 A. I graduated Harvard class of 24 '79. 25 Q. What did you do after that?</p>	<p style="text-align: right;">49</p> <p>1 Merkin - Direct/Bamberger 2 merger arbitrage deals. 3 Q. At some point you got your 4 Series 7 license; is that correct? 5 A. That's right. 6 Q. When was that? 7 A. I think later than that, if I 8 remember correctly. I think in the 9 mid-eighties. 10 Q. And you left Halcyon, correct? 11 A. Yes. 12 Q. Why did you leave? 13 A. I'm assuming that is a bump. 14 I'm sorry, what was your -- I couldn't 15 hear you. 16 Q. No problem. 17 Why did you leave Halcyon? 18 A. I left Halcyon to join a 19 colleague named Joel Greenblatt at a firm 20 called Gotham Capital. 21 Q. Were you a partner of 22 Mr. Greenblatt's when you joined? 23 A. Yes. 24 Q. For how long were you with 25 Gotham?</p>

13 (Pages 46 to 49)

<p>50</p> <p>1 Merkin - Direct/Bamberger 2 A. Three or four years. 3 Q. What did you do there? 4 A. Helped in the process of 5 analyzing investments and managing a 6 portfolio. 7 Q. Did you do anything else? 8 A. At -- at Gotham? 9 Q. Yes. 10 A. Helped manage the enterprise. 11 Q. Okay, correct to say that in the 12 world of asset management there are two 13 primary functions that need to be played: 14 One, for want of a better word, is asset 15 gathering. The other would be asset 16 deployment. 17 True? 18 A. I think there are many more 19 functions than those two. I'm not sure 20 what you mean by "primary." Those are two 21 functions. 22 Q. Would you agree with me those 23 are the primary functions, without being 24 philosophical. I don't want to have a 25 debate with you.</p>	<p>52</p> <p>1 Merkin - Direct/Bamberger 2 had or I might have had. 3 Q. About what year was that? 4 A. That would have been, I guess, 5 mid-eighties. I'm not quite sure. 6 Q. When did you and Victor Teicher 7 begin to work together? 8 A. I would think that that would be 9 toward the later eighties. 10 Q. What brought you together? 11 A. I'm sorry? 12 Q. What brought you together? Why 13 did you begin to work with Mr. Teicher? 14 A. I thought Mr. Teicher had skills 15 in the investment management business, and 16 he and I began to work together with 17 respect to certain assets that we had 18 under management. 19 Q. When did you leave Gotham? 20 A. Let's see... 21 Roughly '87 or '88. Probably 22 '88 or '89, actually. 23 Q. Why did you leave Gotham? 24 A. Gotham, as it was then 25 constituted, pretty much went out of</p>
<p>51</p> <p>1 Merkin - Direct/Bamberger 2 A. Asset deployment, you mean 3 investing in capital? 4 Q. Raising the capital and 5 investing the capital, those are the 6 two -- 7 A. Those are two very important 8 functions. 9 Q. And correct to say that at 10 Gotham you began to be more involved, 11 based upon your connections, in capital 12 raising, than in capital deployment or 13 investment? Fair summary? 14 A. No. In Gotham I think for a 15 period of time we were very deliberately 16 not interested in raising additional 17 capital. So it wouldn't have been 18 something I did. 19 Q. Where did you meet Victor 20 Teicher? 21 A. I'm not sure where I met him for 22 the first time. It might have been in the 23 back of a courtroom in Brooklyn where we 24 both came to listen to some matter that 25 pertained to an investment he might have</p>	<p>53</p> <p>1 Merkin - Direct/Bamberger 2 business. Not formally perhaps, but the 3 Greenblatt family had sold the business, 4 raised a fair amount of capital, and 5 pretty much from that time on, Joel 6 Greenblatt, who I referred to earlier, was 7 interested in managing the capital of his 8 family, and maybe one or two, but very 9 few, if any, outside additional investors. 10 Q. Is it a fair summary to say that 11 at that point when you left Gotham you 12 pretty much broke out on your own, as an 13 asset manager/gatherer; fair? 14 A. I was no longer in business with 15 Joel, that is true. 16 Q. You went into business for 17 yourself? 18 A. Yes. 19 Q. And you began to work with 20 Victor Teicher very closely at that time; 21 is that a fair summary? 22 A. I began to work with Victor at 23 that time, I think -- I'm not sure it 24 started the next day, but more or less at 25 that time is when it happened, yes.</p>

14 (Pages 50 to 53)

<p style="text-align: right;">54</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. And you formed a firm of your</p> <p>3 own, did you not?</p> <p>4 A. I formed -- I just didn't hear</p> <p>5 you.</p> <p>6 Q. No problem.</p> <p>7 You formed a firm of your own at</p> <p>8 that time?</p> <p>9 A. Yes.</p> <p>10 Q. What was the name of that</p> <p>11 firm --</p> <p>12 A. At that time --</p> <p>13 Q. What was the name of the firm?</p> <p>14 A. At that time we had a fund</p> <p>15 called Ariel Capital LP, and I believe</p> <p>16 Ariel was the name of the firm.</p> <p>17 Q. It's hard for me to hear now.</p> <p>18 You said Ariel?</p> <p>19 A. Yes.</p> <p>20 Q. Was it Ariel Management</p> <p>21 Corp. that was the name of the management</p> <p>22 company, and Ariel Capital I was the name</p> <p>23 of the fund?</p> <p>24 A. I believe that's correct.</p> <p>25 Q. What was the specializations of</p>	<p style="text-align: right;">56</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 some capital"? I'm thinking about legal</p> <p>3 entities. And one was called Ariel</p> <p>4 Capital I, correct?</p> <p>5 A. (No response.)</p> <p>6 Q. And at some point that name --</p> <p>7 the en -- the name of that entity was</p> <p>8 changed to Gabriel Capital LP, correct?</p> <p>9 A. Yes.</p> <p>10 Q. Then, separately from that, at a</p> <p>11 point in time you formed an entity called</p> <p>12 Ascot Partners LP, and your documents say</p> <p>13 that that occurred in late 1992. Are you</p> <p>14 aware of that, sir?</p> <p>15 A. I'm not sure what you're asking</p> <p>16 me. I'm aware that Ariel was renamed</p> <p>17 Gabriel and I'm aware that we started</p> <p>18 something called Ascot.</p> <p>19 Q. Talking specifically about the</p> <p>20 Ariel Fund, which would of course be the</p> <p>21 fund in whose name and account would be</p> <p>22 opened at Madoff, was an account opened at</p> <p>23 Madoff by Ariel in or about 1989 or 1990?</p> <p>24 A. I think so. Yes.</p> <p>25 Q. How was that account used at</p>
<p style="text-align: right;">55</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 the Ariel Partners fund, when you formed</p> <p>3 it? What did it do? How did it invest?</p> <p>4 A. By and large we looked at ideas</p> <p>5 that came out of restructurings, either</p> <p>6 equity-driven restructurings which might</p> <p>7 be speculating in announced transactions</p> <p>8 or announced takeovers of companies, or</p> <p>9 debt-driven restructurings, which would be</p> <p>10 either bankruptcies or other forms of</p> <p>11 reorganizations.</p> <p>12 Q. At that time did Ariel, in the</p> <p>13 beginning -- that's about 1989, sir, if I</p> <p>14 have that right?</p> <p>15 A. I think that's right.</p> <p>16 Q. -- did Ariel open any accounts</p> <p>17 at Bernard L. Madoff?</p> <p>18 A. I believe we had some capital</p> <p>19 with Madoff. I can't tell you whether it</p> <p>20 started at the very beginning, but I would</p> <p>21 say at the very, very late eighties</p> <p>22 through probably something like 1992 we</p> <p>23 had some capital with Madoff.</p> <p>24 Q. Okay. Do you understand my</p> <p>25 slight difficulty when you say, "we had</p>	<p style="text-align: right;">57</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 that time?</p> <p>3 A. I'm not sure what you're asking.</p> <p>4 Q. Did you in fact invest monies in</p> <p>5 Ariel in an account at Madoff for Ariel in</p> <p>6 1989?</p> <p>7 A. Yes.</p> <p>8 Q. Generally speaking, what portion</p> <p>9 of its capital would be allocated to the</p> <p>10 Madoff account, in the very earliest</p> <p>11 years?</p> <p>12 A. A small fraction. I don't</p> <p>13 recall the exact percentage.</p> <p>14 Q. Would it be under ten percent?</p> <p>15 A. It might have been. And it</p> <p>16 might have been over. I just don't recall</p> <p>17 the percentage. The percentage might have</p> <p>18 varied over a period of two or three</p> <p>19 years.</p> <p>20 Q. Let me make sure I understand.</p> <p>21 In my understanding, having</p> <p>22 reviewed certain materials and talking to</p> <p>23 people -- but I want your understanding.</p> <p>24 Is it not correct that you</p> <p>25 opened Ascot Partners LP for the specific</p>

15 (Pages 54 to 57)

<p style="text-align: right;">58</p> <p>1 Merkin - Direct/Bamberger 2 purpose of pooling all the money that 3 would be transferred to Madoff, and that 4 its role would be different from 5 Ariel/Gabriel in that way? 6 A. Ascot had a different function 7 than Ariel and Gabriel. 8 Q. Thank you. 9 Put it in your terms. What was 10 its different function? 11 A. Ascot was interested in 12 allocating money to strategies that were 13 possibly lower return, possibly lower 14 volatility, and generally higher 15 liquidity, meaning, more easily redeemed, 16 more easily turned into liquid assets, 17 than Ariel or Gabriel. Thinking of Ariel 18 and Gabriel as one. 19 Q. And that was its purpose from 20 day one, correct? 21 A. Its purpose from day one was to 22 allocate capital to those kinds of 23 strategies, including strategies that were 24 not performed entirely in our shop. And 25 for that reason, from day one had a</p>	<p style="text-align: right;">60</p> <p>1 Merkin - Direct/Bamberger 2 and losses. 3 That is, at the end of a 4 calendar year all positions were marked to 5 market. All positions were marked to 6 market every day, but for purposes of 7 computing the fee, positions marked to 8 market were netted, gains and losses, then 9 netted against each other. And if there 10 was a profit during the course of that 11 year, 20 percent of that profit was 12 allocated to that general partnership. 13 There was no incentive fee of 14 any sort in Ascot. 15 Q. And that reflected the different 16 purposes that those funds would be 17 performing, correct? 18 A. That reflected not merely the 19 different objectives, but the different 20 management of capital. The allocation of 21 capital, substantially all of the assets 22 outside of the shop and the use of third 23 parties, and the emphatic use of third 24 parties, suggested to me a management fee 25 only, and no use of an incentive fee.</p>
<p style="text-align: right;">59</p> <p>1 Merkin - Direct/Bamberger 2 different and distinctive fee structure 3 that reflected that fact. 4 Q. Okay. That fee structure at the 5 time was simply 1 percent of assets under 6 management? 7 A. Assets under management, hence a 8 management fee. 9 Q. Okay. Did you call it a 10 management fee way back then? 11 A. In the early document? 12 Q. Yes. 13 A. I don't recall as I sit here. 14 Q. From the very earliest time 15 Ariel/Gabriel, what became Gabriel, its 16 fee structure was different? 17 A. Yes. 18 Q. What was its fee structure, from 19 the beginning of time? 20 A. It had a management fee and an 21 incentive fee. 22 Q. What was the incentive fee at 23 the time? 24 A. The incentive fee was 20 percent 25 of net realized and unrealized net gains</p>	<p style="text-align: right;">61</p> <p>1 Merkin - Direct/Bamberger 2 Q. Okay. Just whenever possible, 3 sir, if you don't mind answering my 4 questions "yes" or "no," or feel free to 5 say you can't answer "yes" or "no," and 6 I'll let you answer. But let's try to 7 keep it as straightforward as we can. 8 A. I'll do the best that I can. 9 Q. Did Victor Teicher play any role 10 with respect to Ascot? 11 A. No. 12 Q. Now, as you may know -- you may 13 know; tell me if you don't -- but the 14 parties exchanged proposed stipulations of 15 uncontested fact? 16 A. The parties in this arbitration? 17 Q. Yes. 18 A. I know I saw a draft of 19 something. I'm not aware that anything 20 was finally agreed to. 21 Q. Did you approve the draft before 22 it went out? 23 MR. LEVANDER: Objection. 24 There's been no agreement. 25 If there's a discussion between</p>

16 (Pages 58 to 61)

<p style="text-align: right;">62</p> <p>1 Merkin - Direct/Bamberger 2 the counsel and the client, this is an 3 invasion of the attorney-client 4 privilege. 5 THE CHAIRMAN: Sustained. 6 BY MR. BAMBERGER: 7 Q. I want to know if the facts that 8 were set forth in that document are true 9 to the best of your knowledge. I assume 10 the answer is yes. 11 MR. LEVANDER: Objection -- 12 THE CHAIRMAN: Sustained. 13 MR. LEVANDER: If you could just 14 ask questions and not make speeches, 15 we would be moving ahead. 16 MR. BAMBERGER: That was a 17 speech. 18 BY MR. BAMBERGER: 19 Q. At some point in time 20 substantially all of the assets of Ascot 21 Partners LP were held, so far as you knew, 22 were in accounts of Bernard L. Madoff 23 Investment Securities? 24 A. Substantial assets were held 25 there, yes.</p>	<p style="text-align: right;">64</p> <p>1 Merkin - Direct/Bamberger 2 A. I -- I don't think so. No, I 3 don't think that's correct. 4 Q. There are two transcribed 5 tape-recordings between you and Mr. Madoff 6 that have been produced in this case, 7 correct? 8 A. I believe so, yes. 9 Q. At the end of one of them, which 10 occurred in January of 2002, you noted on 11 the tape that you had been investing with 12 Mr. Madoff for 13 years. 13 You're aware of that, right? 14 A. I don't remember that. But if 15 you tell me it's there, I'm sure it is. 16 Q. Did you personally ever open an 17 account at Mr. Madoff's shop in your own 18 name? 19 A. I don't recall. I had been an 20 investor with Mr. Madoff through an entity 21 called 61M Associates, which -- or 61M 22 Partners, I can't remember which one it 23 is -- which was an entity that had been 24 administered through the Scheure family 25 office in the late eighties.</p>
<p style="text-align: right;">63</p> <p>1 Merkin - Direct/Bamberger 2 Q. When did that begin to be true? 3 A. I don't know the date. 4 You're asking me about Ascot, 5 right? 6 Q. I am. 7 A. I would say '92/'93. 8 Q. All right. 9 Are you aware that in this case 10 documents have been provided, including a 11 single page, that says Ascot Partners LP 12 and predecessor accounts, and that that 13 goes back to 1988? 14 I assume that reference to the 15 predecessor accounts means before the 16 formation of Ascot. Is that right? 17 A. I honestly don't know the 18 document you're referring to. I don't 19 know that Ascot existed before '92, '93. 20 Q. We'll show you the document in a 21 few minutes. 22 But there's no question that you 23 were managing or administering individual 24 accounts that were held at Madoff for a 25 fee as early as 1988 and 1989, correct?</p>	<p style="text-align: right;">65</p> <p>1 Merkin - Direct/Bamberger 2 Q. Did you have any other indirect 3 investments with Mr. Madoff? 4 A. Hmmm -- I don't think so. 5 Q. Did any other members of your 6 family have such investments? 7 A. In 61M? 8 Q. Yes. 9 A. Not that I'm aware of. 10 Q. How about in other vehicles? 11 A. Say it more slowly. 12 Q. How about any other vehicles 13 which in turn invested with Mr. Madoff? 14 A. I lost you. Ask the whole 15 question. 16 Q. Sure. 17 Did any family members or 18 foundations or other entities with which 19 you're associated invest with Mr. Madoff 20 through an entity such as 61M Associates 21 besides yourself and besides the testimony 22 you just gave? 23 A. When? 24 Q. From 1960 on. 25 A. I just don't know. It's too</p>

17 (Pages 62 to 65)

<p style="text-align: right;">66</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 broad. I don't know.</p> <p>3 Q. Okay.</p> <p>4 Now, you're aware that</p> <p>5 Mr. Steinhardt was quoted in a published</p> <p>6 book as saying that your father and Bernie</p> <p>7 Madoff were close friends.</p> <p>8 Is Mr. Steinhardt correct when</p> <p>9 he says that?</p> <p>10 A. I never heard that from</p> <p>11 Mr. Steinhardt.</p> <p>12 My father and Mr. Madoff were</p> <p>13 acquaintances. I would not think of them</p> <p>14 as close friends.</p> <p>15 Q. All right.</p> <p>16 Right in the beginning, what</p> <p>17 efforts did you make to understand how</p> <p>18 Mr. Madoff made his profits?</p> <p>19 A. At some point I went to visit</p> <p>20 Mr. Madoff, more than once had</p> <p>21 conversations with him about what the</p> <p>22 strategy was that he was using, what the</p> <p>23 strategy had been in the past, what the</p> <p>24 strategy might be in the future, what it</p> <p>25 might evolve to.</p>	<p style="text-align: right;">68</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 beneath those stocks, and selling calls</p> <p>3 above those stocks.</p> <p>4 Q. In the earliest years how many</p> <p>5 stocks did you understand were involved?</p> <p>6 A. There's no limit to the number</p> <p>7 of stocks that could be involved. But, I</p> <p>8 mean -- maybe I don't understand the</p> <p>9 question. Involved how? In the</p> <p>10 portfolio?</p> <p>11 Q. Yes.</p> <p>12 A. At any one time -- I'm just...</p> <p>13 Q. I don't want to short-circuit</p> <p>14 this.</p> <p>15 Am I not correct to say that you</p> <p>16 always received monthly account statements</p> <p>17 and could simply look at the portfolio of</p> <p>18 stocks at any given?</p> <p>19 A. I thought you were still talking</p> <p>20 about early conversations.</p> <p>21 Yes. The portfolio generally</p> <p>22 consisted of a number of large cast stocks</p> <p>23 with puts beneath those stocks, but puts</p> <p>24 struck on those stocks.</p> <p>25 In other words, let's say the</p>
<p style="text-align: right;">67</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Looked at physical evidence of</p> <p>3 the strategy.</p> <p>4 Spoke to investors of his, spoke</p> <p>5 to customers of his, those being two</p> <p>6 different types of relationships; that is,</p> <p>7 spoke to investors of his in the money</p> <p>8 management end of what he was doing, and</p> <p>9 spoke to customers of his in the wholesale</p> <p>10 trading end of what he was doing, and had</p> <p>11 a general idea of his reputation and</p> <p>12 stature on Wall Street, which was very</p> <p>13 considerable.</p> <p>14 Q. I'm asking you what you</p> <p>15 understood his investment strategy to be.</p> <p>16 In the very earliest years, what</p> <p>17 did you understand his investment strategy</p> <p>18 to be? How was he actually making money?</p> <p>19 In your earliest years.</p> <p>20 A. In the earliest years of my</p> <p>21 conversations with him, as distinct from</p> <p>22 his earliest years, so I want to make sure</p> <p>23 that's the question you asked, it was</p> <p>24 essentially the strategy consisted of</p> <p>25 buying stocks, individual stocks, puts</p>	<p style="text-align: right;">69</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 stock was IBM or XYZ. The XYZ stock, a</p> <p>3 put that was struck on XYZ at a strike</p> <p>4 price for a preferred period of time, and</p> <p>5 short a call at an XYZ call.</p> <p>6 And there may have been, I would</p> <p>7 guess, something like 15 to 20 of those</p> <p>8 stocks and puts and calls at that time.</p> <p>9 It might have been a little bit</p> <p>10 less than that. I don't think it was</p> <p>11 necessarily much more than that --</p> <p>12 Q. Okay. There came a time --</p> <p>13 A. -- as I can recall today.</p> <p>14 Q. Thank you.</p> <p>15 There came a time when he</p> <p>16 changed that strategy, correct, and began</p> <p>17 to use index options, including index puts</p> <p>18 and index calls, correct?</p> <p>19 A. Well, the strategy evolved. The</p> <p>20 strategy had already evolved at that time,</p> <p>21 but it evolved further, to, instead of</p> <p>22 say -- I'll stick with my number -- say 17</p> <p>23 or 18 or 20 individual stocks, puts and</p> <p>24 calls, there would be a number of stocks,</p> <p>25 common to all of them was their presence</p>

18 (Pages 66 to 69)

<p style="text-align: right;">70</p> <p>1 Merkin - Direct/Bamberger 2 and membership in the S&P 100, and instead 3 of specific puts and specific calls 4 specific to those stocks, he would use OEX 5 puts and OEX calls which were struck on 6 the S&P 100 index. 7 So the OEX's are not the SPX's 8 and the 100 are not the 500. 9 Q. About what year did he start to 10 do that, in your understanding? 11 A. Early to mid nineties. 12 Q. So 1992, '93? 13 A. Early to mid nineties. 14 Q. And when he started to buy and 15 sell OEX puts as opposed to puts on 16 individual stocks, did his selection of 17 stocks for the portfolio change? 18 A. Well, I think I said that all of 19 the stocks were in the S&P 100. And to 20 the extent that he had previously used 21 stocks outside of the S&P 100, I just 22 don't remember. 23 They were always very large cap 24 stocks. I don't think that many were lost 25 by -- in that move. I just don't</p>	<p style="text-align: right;">72</p> <p>1 Merkin - Direct/Bamberger 2 A. I don't know what you mean by 3 that. 4 You're suggesting that he was in 5 a practice of stock-picking and he stopped 6 doing that. 7 I never thought of him as being 8 in the practice of stock-picking as that 9 phrase is conventionally used. And you 10 may be using it in a different way. 11 Stock-picking, to me, is somebody who 12 picks the stocks, goes long stocks, holds 13 them for really, really long periods of 14 time and tries to earn monies. He's 15 actually an investor. 16 In Madoff's case I believe he 17 was trying to create a rate of return by 18 using stocks, puts and calls. 19 Confining the upside by selling 20 calls is basically antithetical to the 21 process of stock-picking because you're 22 always capping your return. 23 Q. To generate a return a rate 24 that's capped in the way described to make 25 money you've still got to pick stocks,</p>
<p style="text-align: right;">71</p> <p>1 Merkin - Direct/Bamberger 2 remember. 3 And the number of shares -- the 4 number of components in the S&P 100 that 5 we used in the portfolio went up over 6 time. 7 Q. You say that "we used"? Did I 8 hear you say "we used"? 9 A. I don't remember -- 10 Q. I thought I heard you say "we 11 used." 12 A. What I said was there was a 13 basket of stocks. All the stocks were in 14 the S&P 100. The number of shares in the 15 basket, the total number of shares, 16 increased over time. 17 Q. Now, in late 2002 Mr. Madoff 18 delivered a trading authorization 19 directive to you for both Gabriel and 20 Ascot, correct? 21 A. Yes. 22 Q. Okay. Would you agree with me 23 that certainly by that time Mr. Madoff was 24 no longer engaged in the practice of 25 stock-picking? True?</p>	<p style="text-align: right;">73</p> <p>1 Merkin - Direct/Bamberger 2 right, sir? Yes or no? 3 A. You have to pick -- you're 4 basically arbitraging a relationship 5 between an index, its components and 6 options on those components. 7 Arbitrage activities, where 8 you're trying to underwrite a certain risk 9 and earn a rate of return as a 10 consequence, to me is different than 11 stock-picking. 12 That's the way I use the phrase. 13 Q. That's fine. You can use words, 14 as long as you explain them. 15 A. As I use those words, I would 16 not have thought of Madoff at any of those 17 junctures engaged in stock-picking, if 18 only for no other reason than his average 19 holding period was running, broadly, one 20 to six months -- much more specifically 21 one, two, three or four months -- and 22 turnover was running several hundred 23 percent; that is, the portfolio turned 24 over a number of times a year. There was 25 virtually never any long-term realized</p>

19 (Pages 70 to 73)

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<p style="text-align: right;">74</p> <p>1 Merkin - Direct/Bamberger 2 gains. 3 And all those things are 4 incidence of stock-picking, rather than 5 someone who's engaged in the rate of 6 return business, as I use those words. 7 Q. Well, you understood, did you 8 not, that to make money doing this you had 9 to own stocks for a period of time and the 10 value of those stocks had to rise, 11 otherwise you couldn't make money doing 12 what he was doing, correct? 13 A. The positions he put on had to 14 behave profitably for you to make money. 15 The positions consisted of long stocks, 16 long puts and short calls. 17 For you to make money, ideally 18 stocks would go up, puts would go down, 19 and above the strikes on the calls you 20 would simply stop making money. 21 Because you had sold away that 22 upside above the strike price, net of the 23 price of the actual option -- that of the 24 money you collected for the -- for the 25 calls you were short.</p>	<p style="text-align: right;">76</p> <p>1 Merkin - Direct/Bamberger 2 A. The process of answering your 3 questions might be aided -- especially the 4 very, very long ones -- I have a screen 5 here, and it's just blank. Can I turn the 6 screen on and see what you're saying? 7 Q. Of course. 8 THE WITNESS: Does someone know 9 how to do that -- I can't read what 10 you're saying. 11 A. You have to parse it, or else 12 I'm not going to be able to answer your 13 question. 14 I'll take a shot at something. 15 Risk arbitrage was not in 16 anticipation of a merger. Risk arbitrage 17 is when a merger is announced and you're 18 trying to arbitrage the difference between 19 the price at which someone is willing to 20 pay for a security, in the simplest form, 21 if it's cash, and the price at which the 22 stock trades. 23 Q. Okay. The reason there is the 24 difference there is that the market 25 recognizes there's a slight chance that</p>
<p style="text-align: right;">75</p> <p>1 Merkin - Direct/Bamberger 2 Q. Would you agree with me, sir, 3 that the term "arbitrage" classically 4 means -- classically involves riskless 5 transactions? It's the selling of one 6 asset on one exchange and the buying of 7 another on a different exchange, and 8 profiting on a relatively small difference 9 based upon the price disparity; would you 10 agree with that, sir? 11 A. I would agree that that's what 12 riskless arbitrage is. 13 I'm not sure that arbitrage is 14 only riskless. I think arbitrage has been 15 applied to risk arbitrage, merger 16 arbitrage, index arbitrage. 17 Arbitrage been applied to many 18 different things. 19 Q. When you speak of risk 20 arbitrage, and that term came to apply to 21 the form of arbitrage in connection with a 22 merger, where you're betting on whether a 23 merger will close or not, the Street began 24 to use the word "risk arbitrage" for that 25 particular activity, correct?</p>	<p style="text-align: right;">77</p> <p>1 Merkin - Direct/Bamberger 2 the merger isn't going to be consummated, 3 correct? 4 A. The market may think there's a 5 huge chance, in which case the discount 6 between those two prices may be very 7 large, and you may or may not be willing 8 to speculate that the deal occurs. 9 If you are willing to speculate, 10 it could be a very large discount, and if 11 you speculate correctly you'll get paid, 12 because you will make the gap between what 13 you paid for the security and what the 14 buyer will pay you for the shares of the 15 company. 16 Q. Okay. I'd like to turn your 17 attention to a document -- 18 MR. BAMBERGER: I'll need one 19 second, Mr. Chairman, if I can, just 20 to get it out myself and refer the 21 Panel to it. 22 There are boxes of exhibits to 23 Mr. Fleming's right -- 24 THE CHAIRMAN: A couple of 25 things.</p>

20 (Pages 74 to 77)

<p style="text-align: right;">78</p> <p>1 Merkin - Direct/Bamberger 2 First, we might want to take a 3 short break. 4 Do you have an exhibit book 5 that -- 6 MR. BAMBERGER: I do, sir. 7 THE CHAIRMAN: -- that the three 8 of us could have so we could follow 9 documents? 10 MR. BAMBERGER: Absolutely, 11 Mr. Chairman. They are to 12 Mr. Fleming's right. I know you don't 13 have a great deal of room up there. 14 I'll ask you to pull out Binder 15 2, and we'll start with it after our 16 break. 17 MR. LEVANDER: Off the record. 18 (Discussion off the record.) 19 THE CHAIRMAN: Let's resume. 20 BY MR. BAMBERGER: 21 Q. Mr. Merkin, can you place Binder 22 Number 2 in front of you. 23 A. Is this where it is -- 24 MR. BAMBERGER: If I may 25 approach. I'll take care of it.</p>	<p style="text-align: right;">80</p> <p>1 Merkin - Direct/Bamberger 2 Q. And the rest of it? 3 A. I'll take a look... 4 Q. And not to be cute, this was 5 provided by your counsel as a single 6 document, meaning it was stapled or 7 otherwise delivered together in some 8 fashion. 9 (The witness reviews document.) 10 A. Just turning the first two or 11 three pages it looks like account 12 documentation. 13 Q. Okay. Do you recall the 14 occasion on which you received this? Why 15 you received it? 16 (The witness reviews document.) 17 A. No. 18 Q. Okay. 19 What you see on the second page 20 of the document, there's a letter 21 apparently signed by Bernard Madoff 22 explaining this has something to do with 23 the U.S.A. Patriot Act of 2001; do you see 24 that? 25 A. Yes, I do.</p>
<p style="text-align: right;">79</p> <p>1 Merkin - Direct/Bamberger 2 (Handing to the witness.) 3 BY MR. BAMBERGER: 4 Q. Sir, can you turn to tab 47, 5 please. 6 (The witness complies.) 7 Q. And the first page of that 8 document appears to be a cover note from 9 Bernie Madoff. 10 Do you see that? 11 A. Yes. 12 Q. Is that his handwriting? 13 A. I don't really know his 14 handwriting. The one or two notes I've 15 got from him look like that. 16 Q. I didn't hear you. 17 A. One or two notes that I've 18 gotten from him over time look like that. 19 They're not much longer than 20 that, and I don't have many of them. 21 Q. Sir, can you identify Exhibit 22 47? 23 A. Well, you've just done that. 24 It's a cover note from Mr. Madoff on the 25 first page.</p>	<p style="text-align: right;">81</p> <p>1 Merkin - Direct/Bamberger 2 Q. And among the documents that 3 appear to have been transmitted, the very 4 last document is a trading authorization 5 directive? 6 A. This is the last document in 7 that tab? 8 Q. The last two pages in that tab, 9 yes. 10 (The witness reviews document.) 11 A. I do. 12 Q. Okay. And now your handwritten 13 notes make reference to these last two 14 pages, do they not? 15 A. My handwritten notes...? 16 Q. In your diligence file for 17 Mr. Madoff make explicit reference to 18 Mr. Madoff, correct? 19 A. That's correct. 20 Q. When you say in those notes that 21 "the bands have been formalized," you're 22 talking specifically about these last two 23 pages, correct? 24 A. I assume I might have been, but 25 I don't know off the top of my head</p>

21 (Pages 78 to 81)

<p style="text-align: right;">82</p> <p>1 Merkin - Direct/Bamberger 2 exactly what you're referring to. 3 Q. Why did the bands have to be 4 formalized? 5 A. I don't know what you mean. 6 Q. Well, when you said in your 7 notes that the bands were formalized, what 8 did you mean? 9 A. I don't know. Show me the notes 10 and I'll explain it to you. 11 Q. Do you need to see the notes to 12 answer my question? 13 A. It might help. 14 Q. Now, the reality is that this 15 trading authorization pretty much 16 describes what would be called a collar, 17 correct? 18 You already described that 19 collar to some extent. You buy the 20 underlying number of stocks in a basket, 21 you buy puts and you sell calls, correct? 22 That's a collar? 23 MR. LEVANDER: Your Honor, I 24 object. Just as a general thing, 25 there's three different questions he</p>	<p style="text-align: right;">84</p> <p>1 Merkin - Direct/Bamberger 2 When it starts having several 3 different aspects and it might be 4 "yes" or "no" to a part or not 5 understood, it's best to break up the 6 question. 7 MR. BAMBERGER: Thank you, 8 Mr. Chairman. 9 BY MR. BAMBERGER: 10 Q. Mr. Merkin, is it correct that a 11 collar has three components? 12 A. I don't think so. 13 Q. Is it correct to say that 14 Mr. Madoff's collar, as described in the 15 trading authorization, had three 16 components? 17 A. I think this trading 18 authorization describes a position that 19 has many, many components. One of which 20 is short options, short call options, and 21 you may think of all of that as a collar. 22 I would not think of all of that 23 as a collar. 24 Q. Whenever possible, just answer 25 my question "no" if you disagree with me.</p>
<p style="text-align: right;">83</p> <p>1 Merkin - Direct/Bamberger 2 just asked in one sentence. 3 If Mr. Bamberger could ask a 4 question, it would be easier for the 5 witness to give an answer, as opposed 6 to you ask the question and then he 7 goes on and asks another question. 8 It's hard for the witness. 9 MR. BAMBERGER: I will try and 10 be careful of that. 11 I would prefer that he just say 12 "Objection" -- 13 THE CHAIRMAN: These speaking 14 objections can be very useful for the 15 jury in the box. But as I look over 16 to the jury box -- 17 MR. LEVANDER: I'm trying to be 18 polite as to -- 19 THE CHAIRMAN: There's no 20 problem. 21 With the objection, which is to 22 a compound question, if all parts of 23 it are easily answered "yes" or "no," 24 there's nothing that terrible about a 25 compound question.</p>	<p style="text-align: right;">85</p> <p>1 Merkin - Direct/Bamberger 2 Then I'll ask my question. 3 The Panel will decide for itself 4 whether there's three components being 5 that are described here? 6 No doubt that the purpose of 7 this directive was that Mr. Madoff was 8 putting himself under certain limitations, 9 correct? That's what it does? 10 A. The directive? 11 Q. Yes. 12 A. The directive explains in fair 13 detail what a position understood in terms 14 of the portfolio as a whole is the basket, 15 the puts and the calls. 16 Q. And he signs it. He's telling 17 you that this is what he's going to be 18 doing, correct? You're not telling him, 19 correct? 20 A. He signs it. 21 Q. All right. Correct to say that 22 from this point forward, certainly from 23 November 2002, he said that the total of 24 the combined market capitalization of the 25 equities purchased must, at the time of</p>

22 (Pages 82 to 85)

86	88
<p>1 Merkin - Direct/Bamberger 2 completion, be in excess of 75 percent of 3 the total capitalization of the entire S&P 4 100 index, correct? 5 A. Where are you reading? 6 Q. Bullet point 3. 7 A. Sorry. 8 (The witness reads document.) 9 A. That's what that says, yes. 10 Q. Okay. And the prior bullet 11 point says that he can only buy these 12 types of instruments, and he must buy at 13 least 35 names, correct? 14 (The witness reads document.) 15 A. When the position is complete, 16 yes. 17 Q. Okay. And then in bullet 4 he 18 says that what he buys at the time of 19 execution must reflect the performance of 20 95 percent of the S&P index, correct? 21 A. The entire portfolio, when it is 22 fully executed, completely executed, has 23 to correlate at that percentage with the 24 overall movement of the S&P 100. 25 Q. So he's clearly by this time out</p>	<p>1 Merkin - Direct/Bamberger 2 A. Neither ten nor 90. 3 Q. Which one? 4 A. I don't know the exact number. 5 Q. Which one? 6 A. Neither ten nor 90. 7 Q. Can you pick a number between 8 them? 9 A. Not 20, not 80, and it may have 10 changed over time. I would not just say 11 50. I think that's too -- 12 Q. Arbitrage? 13 A. -- too arbitrary. It couldn't 14 have constantly been exactly half. 15 Q. What percentage of total 16 performance did arbitrage represent? 17 A. Varied from time to time. It 18 varied from times that we came in. There 19 were times where some of the arbitraging 20 function may have already suggested some 21 slight wind at our back because of the -- 22 because of its ability to arbitrage among 23 the components of this trade. And that 24 also turned a little bit on his 25 executions.</p>
87	89
<p>1 Merkin - Direct/Bamberger 2 of the stock-picking business, as far as 3 you're concerned, correct? 4 A. As far as I was concerned he was 5 never in the stock-picking business. 6 Q. As you've testified. 7 A. Correct. 8 Q. He was a pure market-timer; 9 that's your understanding? 10 A. No. Certainly not. 11 Q. Well, besides stock-picking and 12 market timing, in your understanding at 13 any time prior to December 11th, 2008 how 14 was Bernie Madoff doing it? 15 A. A combination of market timing 16 to be sure. But when you said "pure," I 17 thought you meant exclusively market 18 timing. It's market timing, plus an 19 arbitrage function, plus executions. 20 He's creating a rate of return. 21 He's not picking stocks. 22 Q. And of those three components, 23 what contribution did market timing make 24 to the overall performance? Ten percent, 25 50 percent, 90 percent?</p>	<p>1 Merkin - Direct/Bamberger 2 Q. I kind of lost you there. 3 So you can't apply a percentage 4 to the arbitrage as a component of the 5 overall performance; is that right? 6 A. Overall over a long period of 7 time I don't have a percentage. 8 There are specific occasions 9 where clearly arbitrage matters. 10 Q. Okay. How about good execution? 11 What percentage of his overall performance 12 do you attribute to that? 13 A. Executions are the way in 14 which -- in the end executions ultimately 15 are everything. It is how well you 16 execute your strategy. You can have a 17 great strategy. If you execute it 18 clumsily, you're not going to have a great 19 strategy. Executions matter. 20 To the extent that it's 21 arbitrage and you're talking about fine 22 differences, executions matter that much 23 more. 24 Q. Well, in 2002, when the S&P 100 25 lost something like 23 percent and Ascot</p>

23 (Pages 86 to 89)

<p style="text-align: right;">90</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 reported a gain of around 12 percent,</p> <p>3 you're not saying that arbitrage had</p> <p>4 anything significant to do with that</p> <p>5 performance that year, are you?</p> <p>6 A. It certainly might have.</p> <p>7 Q. Uh-hum.</p> <p>8 A. It very easily could have. I'm</p> <p>9 not saying it did because I just don't</p> <p>10 remember.</p> <p>11 But the overall correlation</p> <p>12 between the S&P and the market strategy's</p> <p>13 performance was exceedingly low.</p> <p>14 Q. Could you look, then, as Exhibit</p> <p>15 47, which I would like to mark into</p> <p>16 evidence.</p> <p>17 MR. LEVANDER: No objection.</p> <p>18 (Claimant's Exhibit 47, received</p> <p>19 in evidence.)</p> <p>20 BY MR. BAMBERGER:</p> <p>21 Q. The sixth bullet point down</p> <p>22 Mr. Madoff writes that:</p> <p>23 "Contemporaneously with the purchase of</p> <p>24 equity securities the undersigned accounts</p> <p>25 shall purchase S&P 100 Index put options."</p>	<p style="text-align: right;">92</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 have something closer to an absolutely</p> <p>3 riskless trade, other than the</p> <p>4 underwriting that we were doing by</p> <p>5 striking the puts beneath the value of the</p> <p>6 S&P.</p> <p>7 What this says is, is that you</p> <p>8 had to have puts on the portfolio, they</p> <p>9 had to equal the market value of the</p> <p>10 equities in the portfolio, and the</p> <p>11 question of where you would place that put</p> <p>12 is also the subject of this directive.</p> <p>13 Q. The correct answer to the</p> <p>14 question I just asked is one word, and</p> <p>15 that word is "insurance," correct?</p> <p>16 That was the purpose of the</p> <p>17 puts, to buy insurance? And that's why</p> <p>18 the total market value of the puts had to</p> <p>19 equal the total market of the portfolio;</p> <p>20 true? Yes or no?</p> <p>21 A. I have no idea. I don't know</p> <p>22 what you mean by "insurance."</p> <p>23 Q. Well --</p> <p>24 A. As I thought of the concept --</p> <p>25 Q. No question.</p>
<p style="text-align: right;">91</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Do you see that?</p> <p>3 A. I do.</p> <p>4 Q. "The underlying value of these</p> <p>5 contracts shall correspond to the market</p> <p>6 value of equities in the portfolio at the</p> <p>7 time of purchase."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. Now, why was that important,</p> <p>11 that the value of the puts had to equal</p> <p>12 the value of the portfolio?</p> <p>13 A. Again, the strategy was designed</p> <p>14 to create a rate of return. Overall</p> <p>15 performance had a very, very low</p> <p>16 correlation with broad markets.</p> <p>17 Uncorrelated strategy.</p> <p>18 An important component in that</p> <p>19 strategy is the notion that we own -- this</p> <p>20 says at least 35. Let's say it's</p> <p>21 typically it's 50 stocks. They are all in</p> <p>22 the OEX, they are all in the S&P 100.</p> <p>23 That's the long side of the portfolio.</p> <p>24 To the extent that we own the</p> <p>25 entire S&P 100 and had OEX puts, we would</p>	<p style="text-align: right;">93</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. As I thought of the concept,</p> <p>3 that would not be the answer to the</p> <p>4 question.</p> <p>5 Q. Can you look at the next bullet</p> <p>6 point?</p> <p>7 A. Next --</p> <p>8 Q. Next bullet point, on the next</p> <p>9 page.</p> <p>10 A. Okay.</p> <p>11 (The witness reads document.)</p> <p>12 Q. The strike price on the puts</p> <p>13 that he was saying he would buy could not</p> <p>14 be greater than 3 percent below the</p> <p>15 prevailing market price of the S&P 100</p> <p>16 index, correct?</p> <p>17 A. That's what it says.</p> <p>18 Q. So he was allowing the portfolio</p> <p>19 so that it could drift down somewhat in</p> <p>20 value before the put would kick in of</p> <p>21 protection, but it couldn't move below the</p> <p>22 3 percent of the value at the time of</p> <p>23 execution, correct?</p> <p>24 A. Essentially, yes.</p> <p>25 Q. That's something he had to do,</p>

24 (Pages 90 to 93)

<p style="text-align: right;">94</p> <p>1 Merkin - Direct/Bamberger 2 right? He had to buy those puts, right? 3 A. That's what the directive as a 4 whole says, yes. 5 Q. You or Mr. Autera checked to 6 make sure he did that, right? 7 A. Yes. 8 Q. And he always did, right? 9 A. By the time the trade was fully 10 executed, we had -- I can't really 11 remember an exception, but we had puts 12 that protected us on the portfolio as a 13 whole, at some initial downside loss to 14 us. 15 Q. Once the puts were in place, 16 according to the next bullet item, then he 17 could go sell calls, correct? 18 A. The next bullet item on the same 19 page? 20 Q. Right. 21 A. One second. 22 (The witness reads document.) 23 Q. Correct? 24 A. Yes. 25 Q. Okay. And there was no</p>	<p style="text-align: right;">96</p> <p>1 Merkin - Direct/Bamberger 2 compound. 3 THE CHAIRMAN: I'm going to 4 overrule. 5 The question, it seems to be 6 defining what he meant by the term. 7 BY MR. BAMBERGER: 8 Q. Would you agree that this is not 9 what's meant by the term "arbitrage," sir? 10 Correct? 11 A. The strategy that's described in 12 these two pages? 13 Q. Yes. 14 A. It is an arbitrage strategy, in 15 my opinion. 16 Q. Okay, thank you. 17 And the rest of the item 18 reflects the sales of the positions. 19 Did you ask for this document or 20 did it just appear on your door one day? 21 A. It did not just appear on my 22 door one day. It was discussed ahead of 23 time. 24 Q. What did he tell you about it? 25 A. Don't remember the conversation</p>
<p style="text-align: right;">95</p> <p>1 Merkin - Direct/Bamberger 2 restriction as to price, correct? 3 A. Correct. 4 Q. Okay. So if he is shorting the 5 calls, he can short the calls at a high 6 price or he can short the calls at a low 7 price relative to the market, whatever he 8 would want to do, and that would have 9 implications for the amount of premium he 10 would cull up, correct? 11 A. As far as the directive was 12 concerned, that's correct. 13 Q. Now, this is totally different 14 from arbitrage, in that this is something 15 that he was duty-bound to do, whereas 16 arbitrage involves looking for price 17 disparities between options on a computer 18 terminal, there might be a very short 19 opportunity that you could do, let's say 20 in 12 minutes or less, on a very limited 21 stock, not an entire index representing 22 the market, correct? 23 This is not a discussion of 24 arbitrage at all? 25 MR. LEVANDER: Objection;</p>	<p style="text-align: right;">97</p> <p>1 Merkin - Direct/Bamberger 2 specifically. But it was announced that 3 we would be -- that he wanted something 4 like this. 5 Q. Tell me, sir -- if I'm wrong 6 you'll just come right out and tell me I'm 7 wrong. This will be a long question. 8 Isn't it right by this time, in 9 November of 2002, we had had a protracted 10 bear market, we had 9/11, we had had 11 WorldCom, we had Arthur Andersen, we had 12 had a terrible economy, and yet Mr. Madoff 13 was reporting positive results, not merely 14 every quarter, but virtually every month, 15 and people wanted to understand, how are 16 you doing this; is this some kind of 17 magic? 18 And in response he sent this, as 19 to say no magic at all, look what I can 20 do. 21 In summary, isn't that what was 22 happening at that time in the market? 23 MR. LEVANDER: Objection. You 24 don't want my speaking objection, but 25 it seems to be about a two-paragraph</p>

25 (Pages 94 to 97)

98	100
<p>1 Merkin - Direct/Bamberger 2 question with at least three or four 3 or five subparts. 4 THE CHAIRMAN: He asked to tell 5 him if he was wrong that the following 6 had occurred. He can answer that yes 7 or no, if it was wrong or it wasn't 8 wrong. 9 BY MR. BAMBERGER: 10 Q. I made a speech, it's true. 11 Was my speech basically true? 12 wasn't it right? 13 A. Your speech? 14 Q. Yes. 15 A. Entirely wrong. 16 Q. Thank you. 17 Can you account for the timing 18 of this issuance of the trading 19 authorization in any way? 20 A. Well, let me say a couple of 21 things. 22 You've said that it was November 23 of 2002. 24 You've said it several times. 25 I'm not sure that that's right. I'm also</p>	<p>1 Merkin - Direct/Bamberger 2 2002, two lines above your signature? 3 If that is your signature. 4 THE WITNESS: I'm sorry. Just 5 direct me again. What page? 6 MR. MILLSON: The page before 7 the trading record. 8 THE CHAIRMAN: It's entitled 9 "Trading Authorization." There's a 10 date on the left-hand side just above 11 where the "Ascot Partners" signature 12 line is. 13 THE WITNESS: Yes. 14 THE CHAIRMAN: November 5, 2002. 15 (The witness reviews document.) 16 THE WITNESS: Yes. Yes, that is 17 my signature and, yes, that is the 18 date on the document. 19 THE CHAIRMAN: Did that document 20 accompany the next page? 21 THE WITNESS: Just one moment. 22 (The witness reads document.) 23 THE WITNESS: It may have. I 24 don't know. It appears to. I was 25 looking at -- at the pages earlier in</p>
99	101
<p>1 Merkin - Direct/Bamberger 2 not sure that it's wrong. 3 Q. Did I misspeak? 4 Well, it said the document's 5 dated October 22, 2002. I'm willing to be 6 corrected, but -- 7 A. You put it in a tab along with 8 documents that way. 9 I don't know that this trading 10 directive came along with the documents 11 that -- or the pages that preceded in tab 12 47. 13 Q. Your counsel produced this to me 14 as a single document, implying to me that 15 in some way in your file it existed 16 together with the earlier documents. 17 A. I have no idea how they provided 18 it to you. I could remind you that we had 19 a discussion as to the dating of the 20 trading authorization. I'm not sure what 21 the date of it is. 22 THE CHAIRMAN: If I can -- 23 A. It may well have been -- 24 THE CHAIRMAN: Is there a date 25 on page stamped 4884 of November 5th,</p>	<p>1 Merkin - Direct/Bamberger 2 this tab, which were October 2002. 3 But -- 4 THE CHAIRMAN: That's apparently 5 when it was sent to you -- 6 THE WITNESS: It appears to. 7 THE CHAIRMAN: It may be wrong. 8 But then the Option Agreement is dated 9 November 5th. The Trading 10 Authorization is dated November 5. 11 The Trading Authorization Directive, 12 which is the next page, is undated, 13 but at least from the exhibit 14 assembly, apparently followed the 15 Trading Authorization, limited to 16 purchase and sales of securities and 17 other -- 18 THE WITNESS: I would draw the 19 same conclusion from the assembly. 20 I'm just not 100 percent sure that the 21 assembly -- that this came in that 22 way. But if it did, I would think the 23 conclusion is right. 24 THE CHAIRMAN: We're just 25 looking at the last two pages --</p>

26 (Pages 98 to 101)

102	104
<p>1 Merkin - Direct/Bamberger 2 THE WITNESS: That is the 3 conclusion I would draw as well. 4 THE CHAIRMAN: Then the date of 5 November 2002 would be appropriate? 6 THE WITNESS: Yes. 7 THE CHAIRMAN: Okay, go ahead. 8 MR. BAMBERGER: Thank you, 9 Mr. Chairman. 10 BY MR. BAMBERGER: 11 Q. Isn't it correct that by the 12 time this trading authorization was 13 received by you certainly the article 14 about Mr. Madoff had occurred in MARHedge, 15 the trade letter, correct? 16 A. I think that's correct. 17 Let me pick up my answer -- 18 Q. I'm sorry about this. But I get 19 to run the show here, and then your 20 counsel will ask you questions. That's 21 how it works. 22 If you can't answer a question 23 of mine "yes" or "no," in general I'll 24 ask -- 25 A. I was answering your prior</p>	<p>1 Merkin - Direct/Bamberger 2 correct. 3 Q. And you resolicited all your 4 investors, right? You have to give them a 5 right of exit at that point, correct? 6 A. It was not involuntary. 7 Q. You had to give them a right to 8 exit, correct? 9 A. Yes. 10 Q. And, therefore, you're 11 transacting with your beneficiaries at 12 that point, are you not? 13 A. I am doing what? 14 Q. You're proposing to alter the 15 transaction with your beneficiaries at 16 that point? 17 A. We changed the fee from -- a 18 management fee from 1 to 1½. It was not 19 involuntary; an investor can stay, an 20 investor can leave, whatever the investor 21 wanted. 22 Q. Is it correct that you didn't 23 tell any of your Ascot investors in 24 writing that your strategy by that time 25 was simply to wire substantially all of</p>
103	105
<p>1 Merkin - Direct/Bamberger 2 question. If you want to ask me a 3 different question, you'll ask me a 4 different question. 5 Q. I will do that. That's my job. 6 A. Please. 7 Q. This trading authorization was 8 certainly issued after the publication of 9 the Barrons article about Mr. Madoff, 10 correct? 11 A. I believe that's correct. 12 Q. We'll look at it more carefully, 13 but the sum and substance of those 14 articles were there was at least a number 15 of people in the financial community 16 expressing a great deal of skepticism 17 about Mr. Madoff, correct? 18 A. I think that's an incorrect 19 characterization of those articles. 20 Q. Isn't it true that effective 21 January 1, 2003 you increased the 22 management fee applicable to Ascot by a 23 factor of 50 percent? 24 A. The management fee went from 1 25 to 1½, I think in January 2003, that's</p>	<p>1 Merkin - Direct/Bamberger 2 Ascot's assets to Bernard Madoff for a 3 custody, portfolio management, execution, 4 et cetera? Correct? You didn't tell 5 anybody -- 6 A. Are we still on the trading 7 directive -- 8 Q. Yes. 9 A. In connection with the trading 10 directive, there was nothing in the 11 trading directive that was a surprise. 12 There's no surprises coming by virtue of 13 the trading directive, since it describes 14 what the strategy had been. 15 Your question assumes, I think, 16 that we had given Mr. Madoff a lump sum of 17 money and that he simply gave us a number 18 every month or every quarter. 19 We had complete transparency on 20 the strategy. The strategy was exactly 21 what the trading directive said it was 22 supposed to be. It was 35 to probably, at 23 its peak, something approaching 60, stocks 24 in the S&P 100 and the options we talked 25 about.</p>

27 (Pages 102 to 105)

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106	108
<p>1 Merkin - Direct/Bamberger 2 So the notion that this 3 directive was done, to answer the question 4 of how did Mr. Madoff do it, is silly, 5 because how Mr. Madoff was doing it was 6 something we saw every day, ins and outs, 7 because there was trading every day, 8 looked at every day, and had quarterly 9 compilations of and monthly compilations 10 of. 11 Q. It's possible to have 12 transparency without understanding it, 13 isn't that right, Mr. Merkin? 14 A. Philosophically-speaking? 15 Q. Yes, sir. 16 A. Many things are transparent and 17 don't necessarily immediately make sense. 18 Q. And in your understanding of 19 Mr. Madoff's strategy, how he actually 20 produced the results would be one of those 21 things? 22 A. Not at all. 23 Q. It didn't make sense to you, 24 sir, right? 25 A. You just asked me that question.</p>	<p>1 Merkin - Direct/Bamberger 2 that are not transparent and returns may 3 not be that understandable. 4 If you don't understand the 5 return, you don't have to invest. 6 But the notion that something 7 that any individual doesn't understand is 8 per se a Ponzi scheme is a form of, I 9 think, ego. 10 Q. So the extent of your 11 understanding of what Mr. Madoff was doing 12 at this point was that basically he was 13 just using a black box which was highly 14 proprietary and he didn't want to share 15 with you and it was okay that you had no 16 understanding? 17 A. I said nothing that suggested 18 anything like that. This is the third 19 time in about ten minutes you 20 mischaracterized my answers. 21 Q. All right, thank you. 22 Sir, can you turn to tab 27 of 23 this volume, please. 24 (The witness complies.) 25 Q. Can you identify what 27 is?</p>
107	109
<p>1 Merkin - Direct/Bamberger 2 The answer is, when you have 3 complete transparency, and you have a 4 daily P&L, what the accumulated P&L is, 5 what the monthly P&L is, what the annual 6 P&L is, when those returns are audited, 7 you understand the strategy. 8 Q. And if you have complete 9 transparency and the strategy makes no 10 sense to you, the only other alternative 11 is Ponzi scheme, correct, in the context 12 in which we're dealing here; true? 13 A. Absolutely not. You're assuming 14 that things -- your question assumes that 15 it's not understandable. I've just gotten 16 done telling you that it is 17 understandable. 18 But to answer your question, 19 something that is transparent and not 20 understandable is not necessarily a Ponzi 21 scheme. There are many things in life 22 that are legitimate that may not be 23 something you understand. 24 You're describing what is 25 typically one of the sort of black boxes,</p>	<p>1 Merkin - Direct/Bamberger 2 A. In a moment. 3 Tab 27 is a letter -- this one 4 seems to be actually addressed to me at 5 our business office, dated April 2004, and 6 I think signed by me. 7 Let me just double-check the 8 last page -- yes. 9 Q. Did you sign each of these 10 letters individually? 11 A. Each of what letters? 12 Q. Your quarterly letters to 13 limited partners in Gabriel Capital LP. 14 A. Likely, yes. 15 Q. Same answer with respect to your 16 quarterly letters to limited partners -- 17 to investors in Ariel? 18 (The witness reviews document.) 19 A. Most likely, yes. 20 Q. And at this time Ariel and 21 Gabriel were essentially onshore/offshore 22 managed accounts? They did similar 23 things, but one was onshore and one was 24 offshore? 25 A. Neither was a managed account.</p>

28 (Pages 106 to 109)

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<p style="text-align: right;">110</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 So they were not managed accounts. So the</p> <p>3 answer is no.</p> <p>4 Q. They were fund to funds?</p> <p>5 A. Neither was a fund to fund, so</p> <p>6 the answer to your question was no.</p> <p>7 Q. Neither were a fund to funds?</p> <p>8 A. The answer to your question is</p> <p>9 they were not managed accounts. They were</p> <p>10 not fund to funds. Each of them was a</p> <p>11 pooled vehicle. One was a domestic entity</p> <p>12 and one was an offshore entity.</p> <p>13 Q. The offshore entity was Ariel?</p> <p>14 A. The offshore entity was Ariel.</p> <p>15 Ariel Fund Limited, a Cayman corporation,</p> <p>16 Cayman Islands corporation.</p> <p>17 Q. That was for offshore investors</p> <p>18 who did not wish to have profits withheld,</p> <p>19 in a nutshell?</p> <p>20 A. I don't know what you're talking</p> <p>21 about. What does "profits withheld" mean?</p> <p>22 Q. I withdraw the question.</p> <p>23 Why did you --</p> <p>24 A. We had any number of domestic</p> <p>25 investors --</p>	<p style="text-align: right;">112</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 how Ascot was then invested, correct?</p> <p>3 A. I think that's correct.</p> <p>4 Q. Now, why was that?</p> <p>5 A. Why was what?</p> <p>6 Q. Why did you send extensive</p> <p>7 letters to investors in Gabriel and Ariel</p> <p>8 telling them the breakdown of their</p> <p>9 portfolio -- for example, the category</p> <p>10 description on page 252 -- and discuss the</p> <p>11 market and make various other</p> <p>12 commentaries, why did investors in Gabriel</p> <p>13 receive such a letter and investors in</p> <p>14 Ascot did not?</p> <p>15 A. Investors in Ascot received a</p> <p>16 quarterly letter telling them of the</p> <p>17 profitability, or lack of it, in a</p> <p>18 quarter, and where things stood</p> <p>19 year-to-date.</p> <p>20 The single most important</p> <p>21 factor, perhaps is the right word,</p> <p>22 governing the returns for the quarter</p> <p>23 reported on essentially is whether the</p> <p>24 fund was in or out.</p> <p>25 Q. Why didn't you send a letter</p>
<p style="text-align: right;">111</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Sir, I withdrew the question.</p> <p>3 Why did you send quarterly</p> <p>4 letters to investors in Gabriel and Ariel</p> <p>5 and not to -- not to investors in Ascot?</p> <p>6 A. We did send quarterly letters to</p> <p>7 Ascot investors.</p> <p>8 Q. They didn't discuss the</p> <p>9 performance of the portfolio, what Ascot</p> <p>10 did, correct?</p> <p>11 A. They certainly reported the</p> <p>12 performance of the portfolio. That's</p> <p>13 exactly what they did.</p> <p>14 Q. They had an NAV number and told</p> <p>15 investors how much their portfolio had</p> <p>16 appreciated for the prior quarter and</p> <p>17 year-to-date, correct, sir?</p> <p>18 A. I don't know that they had an</p> <p>19 NAV number. But they reported the</p> <p>20 quarterly performance, and they might very</p> <p>21 well have reported the year-to-date</p> <p>22 performance as well.</p> <p>23 Q. Unlike this letter that was</p> <p>24 directed to Gabriel Limited Partners,</p> <p>25 there was no commentary whatsoever as to</p>	<p style="text-align: right;">113</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 telling them that?</p> <p>3 A. I'm not finished with my answer.</p> <p>4 Q. Please. Pardon me.</p> <p>5 A. The overwhelming, supermajority</p> <p>6 of our investors in Ascot understood the</p> <p>7 strategy and understood the Madoff</p> <p>8 organization role in the strategy, and,</p> <p>9 therefore, understood that the single most</p> <p>10 important characteristic for the return</p> <p>11 is -- for that quarter is did we catch a</p> <p>12 turn or did we not catch a turn.</p> <p>13 And that didn't seem to me to be</p> <p>14 something worth putting in a letter.</p> <p>15 Q. When you used the words "catch a</p> <p>16 turn," are those words you would use with</p> <p>17 those overwhelming majority of investors,</p> <p>18 "catch a turn"?</p> <p>19 A. Yes.</p> <p>20 Q. Were you either stating or</p> <p>21 implying that all volatility was good and</p> <p>22 when using an arbitrage strategy you don't</p> <p>23 care if the market goes up or down, you're</p> <p>24 just looking for price disparities, and</p> <p>25 therefore you're trying to catch a turn?</p>

29 (Pages 110 to 113)

<p style="text-align: right;">114</p> <p>1 Merkin - Direct/Bamberger 2 Is that the nature of the comment to 3 investors? 4 A. If I can parse that correctly, 5 all volatile markets go up and down. 6 Q. Okay. 7 A. So to say that a market is 8 volatile, your question suggests -- 9 implies that there's volatility that is 10 not up and down. There is no volatility 11 that is not up and down. 12 Q. The trading authorization 13 directive we just looked at clearly 14 reflects a bullish strategy with respect 15 to stocks, right? 16 That's obvious. 17 A. I don't know that -- about 18 stocks. The trading authorization that is 19 as the tag end of tab 47 works in bullish 20 markets in terms of profitability in very, 21 very narrow segments of both. That's the 22 whole concept of a turn. You catch a turn 23 in a volatile market that is particularly 24 appropriate for the strategy. 25 Catching a turn doesn't require</p>	<p style="text-align: right;">116</p> <p>1 Merkin - Direct/Bamberger 2 markets and lower correlations. 3 This strategy overall had a low 4 correlation with the S&P's performance, 5 but it was able to catch turns within bull 6 and bear markets that worked for the 7 strategy. 8 And that, in a nutshell, was how 9 the strategy works. 10 Q. You told New York Law School 11 Finance Committee that your strategy 12 worked in any market, correct? 13 A. I don't think I said that, no. 14 Q. You told New York Law School 15 Finance Committee that you only had to be 16 right 22 percent of the time and Ascot 17 would be profitable, correct? 18 A. I can't imagine what I said that 19 they transcribed into that sentence. 20 But that is a transparently, and 21 understandably, on the basis of the 22 transparency, idiotic statement for 23 someone to think that I made. 24 Q. Do you deny that when you had 25 the on-site visit with Spring Mountain</p>
<p style="text-align: right;">115</p> <p>1 Merkin - Direct/Bamberger 2 a bull market. 3 Q. Right. 4 A. So that's an important 5 distinction. 6 Q. Exactly my point. 7 A. If you understand that, you'll 8 understand how the strategy works. 9 Q. Arbitrage strategy is always 10 understood to be indifferent to the 11 overall movements in the market? 12 A. No. Almost no strategy is 13 completely indifferent to the market. 14 It's just a lower correlation, but not 15 indifferent. 16 Q. But an arbitrage strategy is 17 very highly indifferent -- 18 A. There are arbitrage strategies 19 and there's arbitrage strategies. What 20 you're really talking about to some extent 21 is a beta. 22 In other words, you're really 23 suggesting that there are arbitrage 24 strategies that have higher betas and 25 lower betas, higher correlations with</p>	<p style="text-align: right;">117</p> <p>1 Merkin - Direct/Bamberger 2 Capital that you described four different 3 strategies to the people that were 4 listening to you that day? 5 A. As best as I remember sitting 6 here today I think that sounds right. 7 Q. You described both a bull 8 strategy and a bear strategy, correct? 9 A. I don't remember that document 10 in detail, but I think I might have. 11 Q. But I'm right that that 12 document -- there are diligence notes -- 13 was a document that to your knowledge was 14 sent to third parties that were 15 considering a possible investment in 16 Ascot; true? 17 A. Which document are you talking 18 about? 19 Q. The minutes of the on-site visit 20 that you had with Spring Mountain Capital. 21 A. Okay, I thought you were back -- 22 so what was your question about that? 23 Q. You knew for a fact that that 24 document was being forwarded by e-mail to 25 other prospective investors in Ascot,</p>

30 (Pages 114 to 117)

118	120
<p>1 Merkin - Direct/Bamberger</p> <p>2 correct?</p> <p>3 A. I had no idea.</p> <p>4 Q. And you never stopped that</p> <p>5 process from occurring, correct?</p> <p>6 A. I had no idea -- I hear it</p> <p>7 suggested now for the first time.</p> <p>8 Q. By 2004 you were certainly a</p> <p>9 very busy man; fair comment?</p> <p>10 A. I suppose so.</p> <p>11 Q. Did you write the first drafts</p> <p>12 of these quarterly letters to Gabriel</p> <p>13 Limited Partners?</p> <p>14 A. Such as the one behind tab 27?</p> <p>15 Q. Yes.</p> <p>16 A. I wrote a lot of them on my own</p> <p>17 up until a certain time. Had somehow --</p> <p>18 had considerable help with them after</p> <p>19 Gerry Balsam joined our shop.</p> <p>20 Q. I kind of figured that.</p> <p>21 When --</p> <p>22 A. All you had to do was ask.</p> <p>23 Q. No problem.</p> <p>24 When did Gerry Balsam join your</p> <p>25 shop?</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 we had made -- my family had made to</p> <p>3 Disney World not a terribly long time</p> <p>4 before then.</p> <p>5 Q. Okay. What you talk about here</p> <p>6 is that investors may want to have some</p> <p>7 idea of where their money's parked, in</p> <p>8 effect, correct? Just like someone wants</p> <p>9 to know where their car is parked in the</p> <p>10 Disney parking lot, the various fields</p> <p>11 with the different names, correct?</p> <p>12 A. What you are asking me is</p> <p>13 correct.</p> <p>14 Q. I think the letter speaks for</p> <p>15 itself, so I'm going to move on.</p> <p>16 A. Okay.</p> <p>17 Q. So turning your attention to the</p> <p>18 second page of the letter, "Understanding</p> <p>19 Details At a Minimum." Do you see that</p> <p>20 paragraph?</p> <p>21 A. Yes.</p> <p>22 Q. The asset classes in which the</p> <p>23 manager is active, that an investor should</p> <p>24 know, correct?</p> <p>25 A. I'm sorry, what are you asking</p>
119	121
<p>1 Merkin - Direct/Bamberger</p> <p>2 A. I think it is about 12 or 13</p> <p>3 years ago. It might have been a little</p> <p>4 bit longer than that. I just don't</p> <p>5 remember exactly.</p> <p>6 Q. Once he joined the shop, is it</p> <p>7 correct to say that he wrote the entire</p> <p>8 first draft?</p> <p>9 A. No. I mean -- you're asking me</p> <p>10 how the first draft came about?</p> <p>11 Q. No. For example, this paragraph</p> <p>12 says "Lost in the Magic Kingdom."</p> <p>13 Do you see that?</p> <p>14 A. I see -- just that little</p> <p>15 heading, where --</p> <p>16 Q. There's a reference to Señor</p> <p>17 Bozo, and his daughter, and Goofy and</p> <p>18 Dopey.</p> <p>19 Do you see all that?</p> <p>20 A. I do.</p> <p>21 Q. Those are all Mr. Balsam's words</p> <p>22 in the first instance, correct?</p> <p>23 A. No. No.</p> <p>24 Q. Are you kidding me?</p> <p>25 A. That came directly out of a trip</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 me is correct?</p> <p>3 Q. That's something that an</p> <p>4 investor should know; in other words, the</p> <p>5 asset class in which he's being invested?</p> <p>6 MR. LEVANDER: I have an</p> <p>7 objection for the Panel, which is</p> <p>8 going to be rife through a number of</p> <p>9 exhibits.</p> <p>10 There are a lot of hand markings</p> <p>11 in the exhibits that Mr. Bamberger</p> <p>12 puts forwards. Those are his hand</p> <p>13 markings in these instances. I don't</p> <p>14 think it's appropriate for counsel to</p> <p>15 mark up the exhibits.</p> <p>16 MR. BAMBERGER: I apologize for</p> <p>17 that. I'll indicate --</p> <p>18 THE CHAIRMAN: I know when you</p> <p>19 say a lot of hand markings -- there's</p> <p>20 a couple of lines on the last</p> <p>21 paragraph on page 2. There is a line</p> <p>22 and an asterisk on the top of page 3.</p> <p>23 So I think that's it.</p> <p>24 MR. LEVANDER: On this</p> <p>25 particular one -- I'm making a</p>

31 (Pages 118 to 121)

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122	124
<p>1 Merkin - Direct/Bamberger 2 point -- you're going to see documents 3 that he has numbers 1 to 20. You're 4 going to see documents, asterisk, no, 5 yes, fraud -- 6 MR. BAMBERGER: No, that's not 7 true, sir. That's not true. 8 THE CHAIRMAN: I assume that if 9 there is anything such as that the 10 marginalia will be disregarded by this 11 Panel. 12 MR. LEVANDER: Thank you. 13 MR. BAMBERGER: Thank you. And 14 Mr. Levander can show me where in 15 these books use the word "fraud." 16 I apologize to the Panel, of 17 course. I should have told you that 18 those markings were there. 19 BY MR. BAMBERGER: 20 Q. You knew that those markings 21 were not on the letter to yourself, 22 correct? That doesn't change your 23 answers? 24 A. The only marking I've seen so 25 far is that something that looks like an</p>	<p>1 Merkin - Direct/Bamberger 2 dollar with Bernard L. Madoff Investment 3 Securities, correct? 4 A. Well, you would if you asked me 5 and you got an explanation as to what 6 arbitrage-related securities is. 7 Q. But only if I did that; is that 8 right? Only if I did that, if I asked you 9 or someone else who was willing to tell 10 me? 11 A. Off of this chart? 12 Q. Right. 13 A. Just off of the categories? The 14 word "Madoff" is not there. 15 Q. That's true of every letter that 16 your organization ever sent to any 17 investor in Gabriel Partners LP through 18 November of 2008, correct? 19 A. I believe that is true. 20 Q. The word "Madoff" doesn't appear 21 in any of those letters, right? 22 A. I believe that is true. 23 Q. Okay. 24 Now, since you are more 25 knowledgeable, you know that Madoff is</p>
123	125
<p>1 Merkin - Direct/Bamberger 2 "N" on the bottom right-hand corner on 3 page 2. 4 Q. In that chart of categories, 5 that chart reflected essentially every 6 last dollar of how Gabriel Capital LP was 7 invested at that particular time, correct? 8 A. This chart speaks as of the end 9 of the first quarter and tries to divide 10 our capital into those categories. 11 Q. At that time a not 12 inconsiderable portion of Gabriel Capital 13 LP's assets were being held, so far as you 14 knew, in accounts at Madoff, correct? 15 A. Well, that would not be the 16 purpose of this chart, but that might be 17 correct, yes. 18 Q. Again, whenever possible, I 19 think you understand, I'm going to ask you 20 questions, do your best to answer them 21 "yes" or "no." 22 Your counsel will drive at the 23 points he wants. 24 If I were to look at this chart, 25 I would not know that I have even one</p>	<p>1 Merkin - Direct/Bamberger 2 reflected in one or more of these 3 percentages on page 2 of the letter, 4 correct? 5 (The witness reviews document.) 6 A. Madoff is reflected in 7 arbitrage-related securities in the list 8 of categories that appears in the middle 9 of page 2. 10 Q. And only in that category? 11 A. I believe so. 12 Q. And is that category entirely 13 Madoff? 14 A. I believe not. 15 Q. What else was in there? 16 A. I don't remember what was in 17 there on March 31, 2004. There may have 18 been additional Madoff -- additional 19 non-Madoff positions, and there may not 20 have been. 21 And on March 31, 2004, I just 22 don't know the component of that category 23 at this time. 24 Q. But all Madoff was in that 25 category, correct? All Madoff to which</p>

32 (Pages 122 to 125)

<p style="text-align: right;">126</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Gabriel had exposure was in that category,</p> <p>3 correct?</p> <p>4 A. Yes.</p> <p>5 Q. Is it correct to say that that</p> <p>6 category was substantially all Madoff at</p> <p>7 any given time?</p> <p>8 MR. LEVANDER: Asked and</p> <p>9 answered.</p> <p>10 MR. BAMBERGER: No. I'm asking</p> <p>11 now -- he said maybe not every last</p> <p>12 position.</p> <p>13 Q. But the great bulk of this</p> <p>14 category in every quarterly letter would</p> <p>15 be Madoff; is that correct?</p> <p>16 A. In absolutely every one of these</p> <p>17 letters? I doubt it.</p> <p>18 Q. Now, to understand these</p> <p>19 categories, one can flip to a -- I see --</p> <p>20 I don't see it in this particular chart,</p> <p>21 but later in time you provided an appendix</p> <p>22 that described what each of these</p> <p>23 categories was doing, correct?</p> <p>24 A. I applied -- there's an appendix</p> <p>25 to some of the letters, correct.</p>	<p style="text-align: right;">128</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Bottom of page 2.</p> <p>3 A. Okay.</p> <p>4 Q. The question of how much risk</p> <p>5 you take, there couldn't be a question</p> <p>6 more central to the investment equation</p> <p>7 than that, right, sir?</p> <p>8 A. Than...?</p> <p>9 Q. Knowing how much risk you take</p> <p>10 for a certain level of potential reward.</p> <p>11 There isn't anything more important than</p> <p>12 knowing how much risk you're taking at any</p> <p>13 time?</p> <p>14 A. How much risk you're taking and</p> <p>15 how much reward you might get are very</p> <p>16 central questions.</p> <p>17 Q. Now, correct to say that by this</p> <p>18 time, April of 2004, you recognized that</p> <p>19 there was a risk that Bernard Madoff was</p> <p>20 conducting a Ponzi scheme, correct?</p> <p>21 A. Absolutely not.</p> <p>22 Q. You had concluded that there was</p> <p>23 zero risk of that?</p> <p>24 A. I thought that there was</p> <p>25 absolutely no risk that Bernard Madoff was</p>
<p style="text-align: right;">127</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. When did you begin putting that</p> <p>3 appendix in?</p> <p>4 A. Hmm, I don't remember.</p> <p>5 Probably around this time. Maybe a letter</p> <p>6 or two --</p> <p>7 Q. Why did you start including an</p> <p>8 appendix describing these categories?</p> <p>9 A. I thought it might be helpful to</p> <p>10 some readers to explain that portion of</p> <p>11 our overall portfolio that was then</p> <p>12 invested in distressed or</p> <p>13 insolvency-driven reorganizations, break</p> <p>14 down into where in the long timeline of</p> <p>15 insolvency-driven reorganizations a</p> <p>16 particular position is at a particular</p> <p>17 time or at the end of a particular</p> <p>18 quarter.</p> <p>19 Q. In the sentence where what you</p> <p>20 call the "N" is, it says: "Our goal then</p> <p>21 is to help you understand the section in</p> <p>22 which we are part and within that section</p> <p>23 how much risk we take."</p> <p>24 Do you see that?</p> <p>25 A. No. What page are you on?</p>	<p style="text-align: right;">129</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 conducting a Ponzi scheme on April 22,</p> <p>3 2004, the date of this letter.</p> <p>4 Q. Zero?</p> <p>5 A. Absolutely not.</p> <p>6 Q. What work did you do to conclude</p> <p>7 that?</p> <p>8 So I'm being clear, I'm not</p> <p>9 saying thought, believed. I'm saying</p> <p>10 concluded?</p> <p>11 By that time you had weighed the</p> <p>12 possibility that this man was conducting a</p> <p>13 Ponzi scheme, correct?</p> <p>14 A. I don't think that I thought for</p> <p>15 a moment that this man was conducting a</p> <p>16 Ponzi scheme.</p> <p>17 Q. Do you remember Bayou? That was</p> <p>18 a hedge fund that imploded because of a</p> <p>19 Ponzi scheme run by Sam Israel, correct?</p> <p>20 A. I think that's what happened</p> <p>21 with Bayou, yes.</p> <p>22 Q. Ever since Charles Ponzi we have</p> <p>23 been living with the threats of Ponzi</p> <p>24 schemes in the financial community,</p> <p>25 correct?</p>

33 (Pages 126 to 129)

<p style="text-align: right;">130</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. I suppose so.</p> <p>3 Q. So there's always some chance</p> <p>4 that somebody's conducting a Ponzi scheme?</p> <p>5 A. Yes.</p> <p>6 Q. It's just a question of whether</p> <p>7 it's a low probability or one that needs</p> <p>8 to be taken -- a very low probability or a</p> <p>9 high probability, correct?</p> <p>10 A. If you want to ask about any</p> <p>11 individual manager, could he be conducting</p> <p>12 a Ponzi scheme; is that your question?</p> <p>13 Q. Yes. There's always that</p> <p>14 possibility, right? It's inherent?</p> <p>15 A. I guess in theory, yes.</p> <p>16 Q. Leon Meyers knew that, right?</p> <p>17 He told you that? You knew that? There's</p> <p>18 always that risk, right?</p> <p>19 A. I don't know what you're</p> <p>20 referring to.</p> <p>21 Q. By this time certainly a number</p> <p>22 of individuals had told you that they were</p> <p>23 suspicious of Madoff and the consistency</p> <p>24 of his returns; true?</p> <p>25 A. Not a single individual at that</p>	<p style="text-align: right;">132</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. I understand that, sir, and I</p> <p>3 accept that. I'm asking you a slightly</p> <p>4 different question.</p> <p>5 I'm asking you: Certainly by</p> <p>6 this time certain people had come to you,</p> <p>7 and you were aware of their critique of</p> <p>8 Mr. Madoff, and they were quite skeptical</p> <p>9 of him? They just didn't understand how</p> <p>10 he was doing it?</p> <p>11 A. The word that I used was</p> <p>12 skeptical.</p> <p>13 Whatever skepticism was</p> <p>14 expressed about Madoff did not go to the</p> <p>15 genuineness of the returns.</p> <p>16 Q. Okay.</p> <p>17 A. The numbers --</p> <p>18 Q. Thank you, sir. That sounds</p> <p>19 like an answer. Do you want to continue</p> <p>20 or not?</p> <p>21 A. I was going to continue, but ask</p> <p>22 another question.</p> <p>23 Q. Again, my question is: The</p> <p>24 skepticism that was said to you is that</p> <p>25 people couldn't understand how he did it.</p>
<p style="text-align: right;">131</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 time, prior to that time, or prior to</p> <p>3 December 11th, 2008, told me that they</p> <p>4 thought that Madoff was conducting a Ponzi</p> <p>5 scheme, that the whole thing was a</p> <p>6 criminal fraud, that no trading ever</p> <p>7 existed and that the record wasn't honest</p> <p>8 and accurate. That conversation never</p> <p>9 took place.</p> <p>10 Q. Is that your way --</p> <p>11 MR. LEVANDER: Can the witness</p> <p>12 be allowed to finish his answer?</p> <p>13 MR. BAMBERGER: Sure.</p> <p>14 A. That conversation never took</p> <p>15 place.</p> <p>16 Q. My question was: Correct to say</p> <p>17 that by this time there were certainly</p> <p>18 people in the investment community that</p> <p>19 had relayed their suspicions of Madoff to</p> <p>20 you?</p> <p>21 A. No skepticism about Madoff</p> <p>22 relayed to me, to use your description,</p> <p>23 ever suggested that the entire office, the</p> <p>24 entire money management operation, was one</p> <p>25 pathological lie.</p>	<p style="text-align: right;">133</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 And when they tried to reverse engineer</p> <p>3 his returns they couldn't do it? That's</p> <p>4 the kind of comment you heard, right?</p> <p>5 A. No.</p> <p>6 Q. The people that were skeptical,</p> <p>7 what did they say?</p> <p>8 A. The overwhelming bulk of the</p> <p>9 skepticism was he departed from an</p> <p>10 approach very similar to the one that you</p> <p>11 articulated three-quarters of an hour ago;</p> <p>12 that the whole thing was some sort of a,</p> <p>13 you know, unexplained strategy.</p> <p>14 You gave Madoff a certain amount</p> <p>15 of money and you got a monthly report or a</p> <p>16 quarterly report or an annual report.</p> <p>17 Most people who didn't</p> <p>18 understand what Madoff was doing never had</p> <p>19 the transparency.</p> <p>20 The overwhelming bulk of people</p> <p>21 who had the transparency were perfectly</p> <p>22 clear as to how the results were achieved.</p> <p>23 The P&L added up, to the penny,</p> <p>24 to what the returns were. And all the</p> <p>25 steps that we had taken on due diligence</p>

34 (Pages 130 to 133)

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<p>1 Merkin - Direct/Bamberger 2 to confirm the accuracy of the returns all 3 worked. 4 So that the returns were 5 perfectly plausible, the returns were 6 confirmed by -- if nothing else -- the 7 absolutely sterling record in redemptions; 8 that is, any time we needed to take money 9 back, we got it back, square to the penny 10 of what the returns were, never asked for 11 extra time and never asked for extra 12 money. 13 So the skepticism as a whole 14 generally was articulated by people who 15 didn't see the transparency. 16 Q. Well, getting your money back, 17 that just means that you could be 18 conducting a Ponzi scheme, right, sir? 19 A. No. 20 Q. But it would be consistent with 21 that possibility? If you pay your 22 redemption on time, that is equally 23 consistent with the possibility of running 24 a Ponzi scheme? 25 A. If you pay all your redemptions</p>	<p>1 Merkin - Direct/Bamberger 2 you suggested I said. 3 Q. Turning to top of page 3 of your 4 letter of April 22, it says: "It is 5 possible to have transparency without 6 understanding." Do you see that it goes 7 on there? 8 A. Yes. That's the sentence you 9 previously quoted. 10 Q. You said: "We can imagine a 11 hypothetical manager who has stupendous 12 risk-adjusted returns for many years." 13 Do you see that? 14 A. Do you want me to read the whole 15 paragraph? 16 Q. Sure. 17 A. Okay. 18 (The witness reads document.) 19 Q. Now Mr. Balsam -- 20 A. Wait. Okay. 21 Q. That sentence, "He may well 22 disclose to investors all his positions, 23 but as long as he has a proprietary black 24 box approach no one outside his firm 25 really understands how those results are</p>
135	137
<p>1 Merkin - Direct/Bamberger 2 on time to the tune of hundreds and 3 hundreds and hundreds of millions of 4 dollars over an 18-year period, that is, 5 in my opinion, a profound refutation of a 6 Ponzi scheme. 7 Q. By this time Mr. Madoff was 8 using what you understood to be a 9 proprietary black box, correct? 10 A. I wouldn't used those words. I 11 wouldn't think of it in those terms. I 12 would use different terms to describe 13 that. 14 Q. Okay. Well, I thought you said 15 he did make substantial use of a 16 proprietary black box? 17 A. No. I contrasted Mr. Madoff's 18 transparency to what is conventionally 19 seen as a black box in order to say that 20 he wasn't a black box. 21 You weren't merely putting some 22 money in and getting some money out. You 23 had complete transparency on the account. 24 Q. Turn to the top of page 3 -- 25 A. So it was the opposite of what</p>	<p>1 Merkin - Direct/Bamberger 2 achieved," that certainly would describe 3 Mr. Madoff at the time? 4 A. You're asking me if that 5 question describes Mr. Madoff? 6 Q. I'm asking if that sentence 7 correctly describes Mr. Madoff in April of 8 2004. 9 A. No. 10 Q. Well, Mr. Madoff disclosed his 11 positions to you, correct, and anybody who 12 held an account? 13 A. I don't know about anybody who 14 held an account. Our account we got the 15 trading records, yes. 16 Q. Okay. 17 Sir, it's a fact that that 18 reference there was specifically to Bernie 19 Madoff, and that the point of this 20 paragraph was that you were contrasting 21 your approach to disclosure to his; that 22 he may not tell the investors every 23 position you hold, but you're going to 24 tell your investors where in general their 25 investment car is parked, right?</p>

35 (Pages 134 to 137)

138	140
<p>1 Merkin - Direct/Bamberger</p> <p>2 A. This letter is written seven</p> <p>3 years ago. Okay? That is the first time</p> <p>4 I ever had the remotest thought that that</p> <p>5 might refer to Mr. Madoff.</p> <p>6 Q. Uh-hum.</p> <p>7 Sir, if can understand this</p> <p>8 generally -- we'll look at the numbers --</p> <p>9 you would agree that over many years the</p> <p>10 S&P 100, the S&P 500, has had wild</p> <p>11 fluctuations up and down, correct?</p> <p>12 A. Over a very long period of time?</p> <p>13 Q. Yeah.</p> <p>14 A. It trends up.</p> <p>15 Q. We can have that discussion --</p> <p>16 but certainly, for example, in the oil</p> <p>17 shock years in '73/'74, the S&P 100 was</p> <p>18 down 18 percent and then 30 percent in</p> <p>19 those two years, right?</p> <p>20 A. I think it dropped by about</p> <p>21 half.</p> <p>22 Q. Turning your attention to the</p> <p>23 eighties, the record reflects that in '81</p> <p>24 the S&P 100 was down about 10 percent --</p> <p>25 MR. LEVANDER: I don't</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 admit 27 into evidence, please.</p> <p>3 MR. LEVANDER: No objection.</p> <p>4 (Claimant's Exhibit 27, received</p> <p>5 in evidence.)</p> <p>6 BY MR. BAMBERGER:</p> <p>7 Q. Could you look, sir, at tab 49,</p> <p>8 please.</p> <p>9 A. This is a bad habit. Do I need</p> <p>10 a sticker or anything?</p> <p>11 Q. Not yet. 49 I will ask you to</p> <p>12 sticker.</p> <p>13 A. Are you asking for 29 or 49?</p> <p>14 Q. 49.</p> <p>15 Now, each of the pages for 49</p> <p>16 I'll represent to you were produced to me</p> <p>17 from your due diligence file on</p> <p>18 Mr. Madoff.</p> <p>19 A. Right. But that wouldn't be the</p> <p>20 whole file.</p> <p>21 Q. Of course not.</p> <p>22 A. Okay.</p> <p>23 Q. They are your handwritten notes,</p> <p>24 right?</p> <p>25 A. Among other things.</p>
139	141
<p>1 Merkin - Direct/Bamberger</p> <p>2 understand the relevance of what</p> <p>3 happened in the seventies and</p> <p>4 eighties.</p> <p>5 MR. BAMBERGER: I'll get there</p> <p>6 quickly.</p> <p>7 Q. And there were other years when</p> <p>8 it was up a lot; there were other years it</p> <p>9 broke even?</p> <p>10 A. The S&P?</p> <p>11 Q. Yes.</p> <p>12 A. The S&P was down, the S&P was</p> <p>13 up, the S&P broke even. The longer you</p> <p>14 look at the measure of time, the more the</p> <p>15 trend is up; the more you isolate it and</p> <p>16 look only at the down years it will be</p> <p>17 down and suffer a loss.</p> <p>18 Q. No matter what happened to the</p> <p>19 S&P, whether it was down or up, Mr. Madoff</p> <p>20 throughout the eighties reported results</p> <p>21 of 20 percent per year, clockwork,</p> <p>22 correct?</p> <p>23 A. Don't remember exactly, but he</p> <p>24 was certainly making money.</p> <p>25 MR. BAMBERGER: I'd like to</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 Q. The first page of 49, the</p> <p>3 handwriting there is a bit cut off. It</p> <p>4 says "Bernard Madoff track record."</p> <p>5 Do you see that?</p> <p>6 A. I do.</p> <p>7 Q. Is that your handwriting?</p> <p>8 A. No.</p> <p>9 Q. Whose handwriting is it?</p> <p>10 A. I don't know.</p> <p>11 Q. Do you have any ideas?</p> <p>12 A. No.</p> <p>13 Q. Did you receive this in '97?</p> <p>14 A. I assume I received this when</p> <p>15 the fax number -- when those little</p> <p>16 telltale things are up at the upper</p> <p>17 left-hand corner. But I'm not sure it was</p> <p>18 faxed to me. It may have been faxed to</p> <p>19 somebody else who gave it to me.</p> <p>20 Q. It's hard to read. V-e-t-i-a?</p> <p>21 Do you know what that is?</p> <p>22 A. I'm just -- where are you</p> <p>23 reading?</p> <p>24 Q. It's cut off -- on top of the</p> <p>25 word, "Madoffs" --</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 A. I see it now. I didn't see it</p> <p>3 before.</p> <p>4 Q. No problem.</p> <p>5 A. That says "Vetia."</p> <p>6 Q. What is that?</p> <p>7 A. I think that's a money</p> <p>8 management firm in New Jersey that is -- I</p> <p>9 associate that with a particular person in</p> <p>10 a particular fund.</p> <p>11 Vetia was their management</p> <p>12 company.</p> <p>13 Q. You received this document and</p> <p>14 saw that Mr. Madoff had never once lost</p> <p>15 money between 1980 and 1996. And in,</p> <p>16 fact, his results were remarkably</p> <p>17 consistent and nonvolatile, correct, sir?</p> <p>18 No matter what the S&P 100 did.</p> <p>19 A. I'm not sure what you're asking</p> <p>20 me. These are the results that I was</p> <p>21 given. Now you're asking me to</p> <p>22 characterize them?</p> <p>23 Q. I see what lesson you drew --</p> <p>24 whether the S&P 100 went up or it went</p> <p>25 down, by a little or a lot, the S&P was</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 A. It's described as something that</p> <p>3 is said in parenthesis as "split</p> <p>4 conversions."</p> <p>5 Q. The performance there is always</p> <p>6 remarkably consistent. It's between 22</p> <p>7 percent and 28 percent, each and every</p> <p>8 year?</p> <p>9 A. You will note that the benchmark</p> <p>10 that is picked is three-month Treasury</p> <p>11 bill.</p> <p>12 Q. That's the benchmark you used</p> <p>13 for Ascot as well, correct?</p> <p>14 A. I believe that's right.</p> <p>15 Because when you're looking at a</p> <p>16 rate of return strategy you benchmark it</p> <p>17 very often against the risk-free money</p> <p>18 market rate of return.</p> <p>19 Q. And the benchmark that you used</p> <p>20 for Gabriel would be the S&P 500, correct,</p> <p>21 sir?</p> <p>22 A. I believe that's correct.</p> <p>23 Q. That was your way of saying</p> <p>24 Ascot was a safer, more conservative</p> <p>25 strategy, on which you would obtain less</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 down 10 percent or 30 percent, it didn't</p> <p>3 matter to Bernie Madoff's results,</p> <p>4 correct?</p> <p>5 A. Bernie Madoff's returns were not</p> <p>6 an S&P-driven return strategy, and had a</p> <p>7 very low correlation with the S&P. I</p> <p>8 would not have picked the S&P as his</p> <p>9 benchmark, for example.</p> <p>10 Q. And on the second page you see</p> <p>11 it says "BEMIS"?</p> <p>12 A. I'm turning the page?</p> <p>13 Q. Please.</p> <p>14 A. I do see that.</p> <p>15 Q. This you understood to be</p> <p>16 another Madoff account?</p> <p>17 A. Yes.</p> <p>18 Q. And his strategy is described</p> <p>19 there, correct?</p> <p>20 A. Yes.</p> <p>21 Q. Not as an arbitrage strategy,</p> <p>22 correct?</p> <p>23 A. Point me in what direction?</p> <p>24 "Strategy"?</p> <p>25 Q. 2, "Strategy."</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 return than the Gabriel strategy, correct?</p> <p>3 A. I'm not sure that that's the way</p> <p>4 I would say it.</p> <p>5 I wouldn't necessarily</p> <p>6 communicate that alone by virtue of a</p> <p>7 choice of benchmark.</p> <p>8 But the choice of benchmark</p> <p>9 basically has to do to what -- the choice</p> <p>10 of benchmark has something to do with</p> <p>11 correlation with S&P. It's not -- it</p> <p>12 doesn't, per se, make it less risky or</p> <p>13 more risky, which is what I thought you</p> <p>14 were asking, or suggesting. It might very</p> <p>15 well be less risky, or more, but it's not</p> <p>16 a per se thing.</p> <p>17 Q. By using a multiple of the</p> <p>18 90-day Treasury bill rate for Ascot, you</p> <p>19 were saying to people, in essence, that</p> <p>20 this is a very safe investment, and you</p> <p>21 should evaluate my success by reference to</p> <p>22 the return on the 90-day Treasury bill,</p> <p>23 correct?</p> <p>24 A. If that's the same question you</p> <p>25 asked me two minutes ago, I've already</p>

37 (Pages 142 to 145)

<p style="text-align: right;">146</p> <p>1 Merkin - Direct/Bamberger 2 answered no. 3 Q. Correct to say that insofar as 4 you came to "manage" charity money, 5 foundation money, college endowments -- 6 and now I have in mind everyone from Elie 7 Wiesel, to Bard, to NYU -- you generally 8 steered them to the Ascot account, because 9 you understood that to be a safer 10 possibility for them, correct? 11 A. Incorrect. Incorrect. 12 For no other reason than we 13 never managed a penny of Elie Wiesel's 14 money. 15 Q. And not ever a penny of Elie 16 Wiesel's foundation money, too? 17 A. True. 18 Q. Mr. Madoff, too? 19 A. So I read in the newspapers. 20 Q. Did you ever discuss Mr. Madoff 21 with Elie Wiesel? 22 A. Not until after December 11, 23 2008. 24 Q. How did you come to possess this 25 second page BEMIS?</p>	<p style="text-align: right;">148</p> <p>1 Merkin - Direct/Bamberger 2 in evidence.) 3 BY MR. BAMBERGER: 4 Q. Sir, turn to tab 50. 5 You collected those documents as 6 well? 7 A. One moment. 8 (The witness reviews document.) 9 A. I don't remember these 10 documents. 11 Q. You don't remember 50, but I'll 12 represent to you it was produced out of 13 your diligence file. 14 A. Okay. I'll accept that 15 representation. 16 Q. And this first page shows the 17 monthly performance of what you understood 18 to be a 100 percent Madoff strategy being 19 executed by Fairfield Sentry; is that 20 right? 21 A. I don't know. Let me take a 22 look at it. 23 (The witness reviews document.) 24 A. I don't know. Does it say that? 25 Q. You came to understand that</p>
<p style="text-align: right;">147</p> <p>1 Merkin - Direct/Bamberger 2 A. I don't know. 3 Q. But you kept it all those years 4 in the diligence file? 5 A. So you tell me. 6 Q. I'm asking you, sir. I wasn't 7 there. 8 A. If this came out of the 9 diligence file, yes. Very likely, yes. 10 Q. And the third page, is that your 11 handwriting, "File, Bernard L. Madoff"? 12 A. Yes. 13 Q. Who provided that to you? 14 A. I don't remember. 15 Q. And in mid 2000, it was provided 16 to you in or about in mid 1995? 17 A. It was awhile ago. I don't 18 remember who gave it to me. It's a 19 partial for 1995. So my guess I didn't 20 get -- I assume he had this by, say the 21 third quarter of 1995. 22 MR. BAMBERGER: I move that 23 document into evidence. 24 MR. LEVANDER: No objection. 25 (Claimant's Exhibit 49, received</p>	<p style="text-align: right;">149</p> <p>1 Merkin - Direct/Bamberger 2 Fairfield Sentry became the single biggest 3 feeder fund into Bernard Madoff by far? 4 A. Yes. I'm not sure this is 100 5 percent. You said 100 percent. I'm not 6 sure it's 100 percent strategy. It may 7 very well be. It just doesn't say it. 8 Q. Well, you see it says "The 9 investment strategy," and then it goes on 10 there. 11 Do you see that? 12 A. Yes, I do. 13 Q. Now, the line that says, "The 14 sale of the calls is designed to increase 15 the standstill rate of return, while 16 allowing upward movement of the stock 17 portfolio to the strike price of the 18 calls," that was also your understanding 19 of what Mr. Madoff was doing for you, 20 correct? 21 A. Not sure what "standstill rate 22 of return" means. 23 Q. "The puts, funded in large part 24 by the sale of the calls, limit the 25 portfolio's downside."</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. And that's a reference to</p> <p>5 insurance, as I described it earlier,</p> <p>6 correct?</p> <p>7 A. That's not how I would use the</p> <p>8 word "insurance."</p> <p>9 Q. Withdrawn. Withdrawn.</p> <p>10 Withdrawn. I know we had that debate, so</p> <p>11 let's not have it again.</p> <p>12 The word "arbitrage," though, is</p> <p>13 not used in this paragraph, correct?</p> <p>14 A. I'll have to read the paragraph.</p> <p>15 (The witness reads document.)</p> <p>16 A. It isn't, but its function is</p> <p>17 described in the second sentence.</p> <p>18 Correlation language is an</p> <p>19 arbitrage -- how shall I say -- term of</p> <p>20 art. It's an arbitrage-rich vocabulary.</p> <p>21 Q. We're getting philosophical</p> <p>22 here.</p> <p>23 The sentence, "A bullish or</p> <p>24 bearish bias can be achieved by adjusting</p> <p>25 the strike prices of the options.</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 call a strike above the market?</p> <p>3 A. Not entirely. Once again,</p> <p>4 you're oversimplifying it.</p> <p>5 The directives permitted a very</p> <p>6 confined expression of a bearish or</p> <p>7 bullish bias, much more than in this</p> <p>8 sentence. But specifically the way you're</p> <p>9 allowed to play with the level of the</p> <p>10 calls, if you thought the market was going</p> <p>11 straight up -- okay? -- the directive very</p> <p>12 clearly said there is no equivalent to</p> <p>13 that 3 percent tether as there is on the</p> <p>14 puts.</p> <p>15 So the directive permitted some</p> <p>16 expression of bullishness or bearishness.</p> <p>17 It permitted some expression of sectors,</p> <p>18 because of the 95 percent or 75 percent</p> <p>19 things. It just confined them.</p> <p>20 Q. If the OEX is at 500, and you're</p> <p>21 buying the puts a strike below, you're</p> <p>22 buying the puts at 495, correct?</p> <p>23 A. Yes.</p> <p>24 Q. If you're selling the calls one</p> <p>25 strike above, you're selling the calls at</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 Overweighting the puts or underweighting</p> <p>3 the calls" -- now we know for sure we're</p> <p>4 out of the world of arbitrage, and we're</p> <p>5 looking for changes in the underlying</p> <p>6 value of the market, correct?</p> <p>7 You're taking a view on the</p> <p>8 future movement of the market; true?</p> <p>9 A. Well, you're adding that.</p> <p>10 You're not out of the world of arbitrage</p> <p>11 completely. You're adding a market call</p> <p>12 bias to the arbitrage activity. And that</p> <p>13 is -- this is reading it very quickly in</p> <p>14 one sentence -- precisely what was</p> <p>15 precluded by the trading directives.</p> <p>16 You could not do that under the</p> <p>17 trading directives. You are out of any</p> <p>18 kind of a bias if that clearly happened,</p> <p>19 and you are squarely in arbitrage land.</p> <p>20 Q. That part we disagree with.</p> <p>21 By that time he wasn't trying to</p> <p>22 achieve a bullish or bearish bias after</p> <p>23 2000 by adjusting the strike prices of the</p> <p>24 options. He was buying the puts a strike</p> <p>25 below the market and he was selling the</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 505, correct?</p> <p>3 A. Yes.</p> <p>4 Q. And if you were doing that, that</p> <p>5 would be purely mechanical. And if you</p> <p>6 were buying the same number of puts that</p> <p>7 you were selling the calls, you would be</p> <p>8 expressing no bias whatsoever, right?</p> <p>9 A. No. Because you're -- no,</p> <p>10 that's not correct.</p> <p>11 Q. Okay.</p> <p>12 MR. BAMBERGER: I move that</p> <p>13 document into evidence.</p> <p>14 MR. LEVANDER: I'm not sure</p> <p>15 where it comes from. I'm not sure</p> <p>16 whether it's relevant to this. For</p> <p>17 what it's worth, we have no objection.</p> <p>18 (Claimant's Exhibit 50, received</p> <p>19 in evidence.)</p> <p>20 BY MR. BAMBERGER:</p> <p>21 Q. Page 5644, those are not my</p> <p>22 circles. I'll just indicate, those</p> <p>23 circles indicate there are only four</p> <p>24 losing months in the period depicted</p> <p>25 there, using the strategy.</p>

39 (Pages 150 to 153)

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<p>1 Merkin - Direct/Bamberger 2 A. What page are you talking about? 3 THE CHAIRMAN: What page are you 4 talking about. 5 Q. Page 5644. 6 MR. FLEMING: Which exhibit? 7 MR. BAMBERGER: Exhibit 50. 8 THE CHAIRMAN: Here it is. Out 9 of sequence. 10 MR. LEVANDER: Going back to my 11 comment a moment ago, he selected 12 certain pages. I don't know where the 13 pages are between. I just don't know 14 what exactly this is. So I have some 15 concerns about it. 16 THE CHAIRMAN: If you had no 17 objection -- 18 MR. BAMBERGER: I was just 19 putting materials together that 20 related to Fairfield Sentry. I see 21 that the first three pages are one 22 document and these appear to be loose. 23 With that objection noted... 24 BY MR. BAMBERGER: 25 Q. This chart shows only four</p>	<p>1 Merkin - Direct/Bamberger 2 Tab 51, first page, top right -- 3 yes, that is my handwriting. 4 MR. BAMBERGER: This is one 5 consecutive document. I move it into 6 evidence. 7 THE CHAIRMAN: Mr. Levander? 8 MR. LEVANDER: No objection. 9 (Claimant's Exhibit 51, received 10 in evidence.) 11 BY MR. BAMBERGER: 12 Q. We'll look together later 13 whether the word arbitrage was ever used 14 here. 15 It says it uses the Madoff 16 strategy? 17 A. What are you asking me to 18 confirm? 19 Q. This document describes the 20 Madoff strategy? 21 A. What are you pointing me at? 22 Q. On page 2 of 5, where it starts 23 with, "The basket of equities is 24 constructed"? 25 A. Page 205?</p>
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<p>1 Merkin - Direct/Bamberger 2 losing months for this strategy in all the 3 time depicted, correct? 4 A. I don't know what you're talking 5 about. Just give me a page. 6 Q. 5644. 7 A. Okay. 8 Q. In this exhibit it's the -- 9 A. It says "net of fees" on the top 10 of it? 11 Q. Yes. It says "net of fees" in 12 handwriting. 13 A. I'm not sure I've ever seen this 14 before. 15 Q. Do you know whose handwriting 16 that is, "net of fees"? 17 A. I do not. 18 Q. The next page it says "File, 19 Madoff." It says "Attention, Mr. Merkin." 20 Is the bottom your handwriting? 21 A. No. 22 Q. Turning to 51, now, that is your 23 handwriting in the upper right-hand 24 corner, is it not? 25 A. One moment.</p>	<p>1 Merkin - Direct/Bamberger 2 Q. 2 of 5. 3 A. Oh, I'm sorry. 4 Q. The paragraph that says "The 5 basket of equities is constructed." 6 A. Well, that first sentence is 7 not -- is not the overall strategy. The 8 first sentence says instead of the S&P 100 9 index, I'm going to create a basket which 10 will let me arbitrage the underlying 11 components of the S&P index, the ones that 12 I choose to own, against the S&P index as 13 a whole. 14 That is exactly an arbitrage 15 strategy. 16 Q. The word "arbitrage" is not 17 used? 18 A. The word "arbitrage" is not used 19 because it describes it more fully. 20 Possibly. I didn't write this. 21 Q. And 52, is that your handwriting 22 on the top? 23 A. 2... 24 (The witness reads document.) 25 A. Page 52?</p>

40 (Pages 154 to 157)

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<p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Tab 52.</p> <p>3 A. You're just going a little bit</p> <p>4 too quickly for me.</p> <p>5 Yes, that is my handwriting.</p> <p>6 Q. And tab 53?</p> <p>7 A. Yes, that is my handwriting.</p> <p>8 Q. And tab 55?</p> <p>9 A. Tab 55, that is my handwriting.</p> <p>10 Q. Why were you collecting these</p> <p>11 semiannual updates on the Fairfield Sentry</p> <p>12 Fund?</p> <p>13 A. I don't think I was collecting</p> <p>14 them. I think I had --</p> <p>15 Q. Why were you receiving them?</p> <p>16 A. My guess is someone sent them to</p> <p>17 me.</p> <p>18 Q. Who?</p> <p>19 A. I don't know.</p> <p>20 Q. Did different people send you</p> <p>21 the semiannual updates?</p> <p>22 A. I said my guess is it might have</p> <p>23 been different people. I don't know who</p> <p>24 sent them to me.</p> <p>25 Q. Can you think of anyone who sent</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 strategies. It's contractual.</p> <p>3 Q. Right.</p> <p>4 Do you agree you never did any</p> <p>5 portfolio management for Ascot?</p> <p>6 A. Strongly disagree.</p> <p>7 MR. BAMBERGER: I'd move all of</p> <p>8 those exhibits into evidence, through</p> <p>9 55.</p> <p>10 MR. LEVANDER: Excuse me.</p> <p>11 MR. BAMBERGER: I move exhibits</p> <p>12 52 through 55 into evidence at this</p> <p>13 time.</p> <p>14 MR. LEVANDER: You didn't ask</p> <p>15 about 54.</p> <p>16 MR. BAMBERGER: I didn't.</p> <p>17 Q. 54 is another document -- is</p> <p>18 that your handwriting in the upper</p> <p>19 left-hand corner that says MEA? Is that</p> <p>20 your handwriting?</p> <p>21 A. No, it is not.</p> <p>22 Q. Do you know what "MEA" refers</p> <p>23 to?</p> <p>24 A. I'm guessing, Michael E. Autera.</p> <p>25 Q. Okay?</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 you the Fairfield Sentry updates?</p> <p>3 A. I believe Roman Igochnikov once</p> <p>4 sent me one.</p> <p>5 Q. Why would he send you them?</p> <p>6 A. I'm not sure what his purpose</p> <p>7 was.</p> <p>8 Q. That -- UBP was a major investor</p> <p>9 in Ascot, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And they certainly knew that</p> <p>12 Ascot was managed by Madoff, correct?</p> <p>13 A. Yes.</p> <p>14 Q. What did they understand your</p> <p>15 role to be?</p> <p>16 A. UBP?</p> <p>17 Q. Yes.</p> <p>18 A. Precisely the role in the Ascot</p> <p>19 documents, page 1.</p> <p>20 Q. And your role, as distinguished</p> <p>21 from Madoff's role, is what?</p> <p>22 A. I'm responsible for the</p> <p>23 allocation of the assets, the supervision</p> <p>24 of the strategies, the organization of the</p> <p>25 audits, and the consideration of other</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 A. But that is not my handwriting.</p> <p>3 MR. BAMBERGER: I move those</p> <p>4 documents into evidence.</p> <p>5 MR. LEVANDER: Subject to</p> <p>6 relevance, I have no objection.</p> <p>7 (Claimant's Exhibits 52 through</p> <p>8 55, received in evidence.)</p> <p>9 BY MR. BAMBERGER:</p> <p>10 Q. With respect to Exhibit 55, you</p> <p>11 make a point of placing the confidential</p> <p>12 offering memorandum of Greenwich Sentry,</p> <p>13 what was then known as Greenwich Sentry,</p> <p>14 into your file, correct?</p> <p>15 A. I made a point of writing "File,</p> <p>16 Madoff" and put it in my out box.</p> <p>17 Q. Why did you keep it, sir?</p> <p>18 A. No particular reason. I think I</p> <p>19 got this from somebody long after this</p> <p>20 document actually had happened -- had come</p> <p>21 about.</p> <p>22 And I think my purpose in</p> <p>23 looking at it in the first place was</p> <p>24 simply to see how they described the</p> <p>25 strategy. I think. I'm not sure I</p>

41 (Pages 158 to 161)

<p style="text-align: right;">162</p> <p>1 Merkin - Direct/Bamberger 2 remember that quite that way. It was a 3 Madoff document. I put it in the Madoff 4 file. 5 Q. You understood one of the 6 principals of what was then Greenwich 7 Sentry was Jeffrey Tucker, correct? 8 A. I doubt it. 9 Q. You came to know that at a later 10 time? 11 A. I'm not sure I knew the name 12 Jeffrey Tucker until after December 11, 13 2008. If I did, it certainly did not 14 stick with me. 15 Q. Do you know the name Walter 16 Noel -- 17 A. I heard the name. I didn't know 18 him. 19 Q. Did you know this fund was the 20 single biggest fund utilizing the Madoff 21 strategy? 22 A. I thought that Fairfield and 23 its -- what should I say -- fund 24 affiliates were a very, very, very large 25 feeder. I'm not sure that I knew they</p>	<p style="text-align: right;">164</p> <p>1 Merkin - Direct/Bamberger 2 not sure they came from my file. Some of 3 these things look new to me for the first 4 time now. Which is not to say that they 5 were not in my file; I just don't 6 remember. 7 Q. Now, no doubt about it -- look 8 at tab -- 9 THE CHAIRMAN: Let him finish 10 the answer before you start the next 11 question. You clip off the end of the 12 answer. 13 And for the witness, you start 14 answering before he finishes the 15 question. 16 You are making this double 17 overlap very difficult for the 18 reporter. 19 MR. BAMBERGER: Thank you, 20 Mr. Chairman. I apologize to the 21 reporter. 22 BY MR. BAMBERGER: 23 Q. Mr. Merkin, turning your 24 attention to tab 55, please. 25 A. Tab 55, yes.</p>
<p style="text-align: right;">163</p> <p>1 Merkin - Direct/Bamberger 2 were the biggest. 3 Q. Did you take comfort from the 4 fact that they were doing -- Greenwich 5 Sentry, later Fairfield Sentry, exactly 6 what you were doing in Ascot, which was 7 leaving all the money for management with 8 Madoff? 9 A. Did I take comfort -- 10 Q. Why you glad that someone else 11 was doing what you were doing? 12 A. I'm not sure -- you mean -- did 13 I take comfort from their due diligence on 14 Madoff, and saying that somebody else had 15 done a lot of work on it and concluded 16 that this was a viable strategy? 17 I'm not sure what you're asking. 18 Q. You can start by answering that 19 question. 20 A. Yes, I think so. 21 Q. Did you review all of those 22 periodic updates that came to you when 23 they were received? 24 A. I don't remember getting 25 anywhere near that number. That's why I'm</p>	<p style="text-align: right;">165</p> <p>1 Merkin - Direct/Bamberger 2 Q. Right at the very first 3 paragraph of this memorandum -- 4 A. The very front page? 5 Q. Well, we can start there, yes. 6 A. If you want to go to another 7 page, go to another page. 8 Q. It says that: "The firm employs 9 an options trading strategy described as 10 split-strike conversion." 11 Do you see that? 12 A. I do. 13 Q. Will you turn to page, lower 14 right-hand corner, 5700 -- 15 A. One moment. What am I looking 16 at on page 5700? 17 Q. First full paragraph, beginning 18 with the words "Greenwich Sentry LP." 19 A. Okay. 20 Q. It says that its objective is to 21 achieve capital appreciation by allocating 22 its assets in an account at Bernard L. 23 Madoff Investment Securities. 24 Do you see that? 25 A. I do.</p>

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<p style="text-align: right;">166</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Have you had a chance to review</p> <p>3 this document?</p> <p>4 A. No.</p> <p>5 Q. When did you first read this</p> <p>6 document?</p> <p>7 A. I'm not sure I ever read the</p> <p>8 entire document. And I don't know when I</p> <p>9 got this. But it's got to be probably</p> <p>10 something like 15 years ago? That may be</p> <p>11 too long. Something like that.</p> <p>12 Q. Sir, can you turn your attention</p> <p>13 to page 5706.</p> <p>14 A. Okay.</p> <p>15 Q. Do you see, under the column</p> <p>16 "Investment Objective," beside the words</p> <p>17 "Investment Objective" there's disclosure,</p> <p>18 under "Summary"? Do you see that?</p> <p>19 A. Wait. Do you mean on the</p> <p>20 left-hand column, "Investment Objectives"?</p> <p>21 Q. Yes.</p> <p>22 A. Yes, I see those two words.</p> <p>23 Q. On the right-hand side there's a</p> <p>24 paragraph describing the objective and</p> <p>25 strategy of the partnership.</p>	<p style="text-align: right;">168</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 from 1992 to 2008, you never made a</p> <p>3 similar disclosure in writing to any Ascot</p> <p>4 investor; true?</p> <p>5 A. Similar to what?</p> <p>6 Q. A clear statement that all</p> <p>7 investment decisions for this fund are</p> <p>8 made by Bernard L. Madoff.</p> <p>9 A. That would have been completely</p> <p>10 untruthful.</p> <p>11 Q. So you made investment</p> <p>12 decisions, too, for Ascot?</p> <p>13 A. Ascot was not confined to a</p> <p>14 strategy at Bernard L. Madoff, and didn't</p> <p>15 have a document that sought to confine it</p> <p>16 in that manner, nor would I ever have used</p> <p>17 the words "split-strike conversions," nor</p> <p>18 did I ever hear that phrase come from</p> <p>19 Mr. Madoff.</p> <p>20 Q. On 5712 do you see the third</p> <p>21 full paragraph? It talks about a bullish</p> <p>22 or bearish bias?</p> <p>23 A. Yes.</p> <p>24 Q. Now, that statement is correct,</p> <p>25 that the further away the strike prices</p>
<p style="text-align: right;">167</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. Do you see that it says that</p> <p>5 Madoff does not share in the profits of</p> <p>6 the partnership?</p> <p>7 A. Yes. As defined. Yes.</p> <p>8 Q. Okay.</p> <p>9 Turn your attention, please,</p> <p>10 sir, to page 5711.</p> <p>11 A. Okay.</p> <p>12 Q. Do you see this document clearly</p> <p>13 says that "All investment decisions in the</p> <p>14 account at BLM are effected by persons</p> <p>15 associated with ELM"?</p> <p>16 A. The first -- the bottom half of</p> <p>17 the page?</p> <p>18 Q. Yes. Under "Investment</p> <p>19 Program."</p> <p>20 A. One second.</p> <p>21 (The witness reads document.)</p> <p>22 A. Yes. That's the discussion of</p> <p>23 stocks and convertibles, yes.</p> <p>24 Q. Correct to say in the</p> <p>25 approximate 16 years of Ascot's existence,</p>	<p style="text-align: right;">169</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 are from the price of the S&P 100 the more</p> <p>3 bullish the strategy? That's true, right?</p> <p>4 A. Just one moment.</p> <p>5 (The witness reads document.)</p> <p>6 A. Hmmm, let's think about that.</p> <p>7 It would depend on the tandem more than</p> <p>8 anything else. So that certainly might be</p> <p>9 right.</p> <p>10 I'm not sure it's always right.</p> <p>11 But if you want me to think</p> <p>12 about it, you've got to give me a moment.</p> <p>13 Q. If you want to come back to it,</p> <p>14 you may.</p> <p>15 A. Just a moment. Just a moment.</p> <p>16 Q. At the bottom of 5712, do you</p> <p>17 see that this document discloses very</p> <p>18 clearly that the options transactions are</p> <p>19 executed primarily --</p> <p>20 A. If you add the word riskier --</p> <p>21 the riskier and possibly more bullish the</p> <p>22 strategy.</p> <p>23 But you're just widening the</p> <p>24 area of possible and profitability.</p> <p>25 What was your question?</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 Q. On the bottom of page 5712, the</p> <p>3 second paragraph from the bottom, this</p> <p>4 document clearly discloses that the</p> <p>5 options transactions effectuated for the</p> <p>6 benefit of this partnership are</p> <p>7 effectuated primarily in the</p> <p>8 over-the-counter and not on a registered</p> <p>9 options exchange.</p> <p>10 Clear disclosure there, right</p> <p>11 sir?</p> <p>12 A. That's what that sentence says.</p> <p>13 Q. Why is it important for an</p> <p>14 investor to know that?</p> <p>15 A. I'm not the author of this</p> <p>16 document. It would perhaps put the</p> <p>17 question of counterparty risk in front of</p> <p>18 the investor.</p> <p>19 Q. There's a general consensus that</p> <p>20 there's essentially no counterparty risk</p> <p>21 on the CBOE because there's an implicit</p> <p>22 guarantee of all transactions in the CBOE,</p> <p>23 whereas in the over-counter-market you're</p> <p>24 taking the over-the-counter risk of the</p> <p>25 counterparties?</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 THE CHAIRMAN: I think after</p> <p>3 that we will break for lunch.</p> <p>4 MR. BAMBERGER: That's fine.</p> <p>5 Were we agreed to break for</p> <p>6 lunch around 1 o'clock.</p> <p>7 THE CHAIRMAN: It depends where</p> <p>8 you are with the witness and where</p> <p>9 your adversary is.</p> <p>10 MR. BAMBERGER: Okay. I just</p> <p>11 have a couple minutes. Then we'll</p> <p>12 break.</p> <p>13 BY MR. BAMBERGER:</p> <p>14 Q. Sir, now, do you see that the</p> <p>15 author of this document is saying that one</p> <p>16 risk factor is its dependence upon</p> <p>17 Bernard L. Madoff Investment Securities?</p> <p>18 Do you see that?</p> <p>19 A. Where are you pointing me? What</p> <p>20 page and what paragraph?</p> <p>21 Q. Paragraph 4 on page 5717.</p> <p>22 A. No, it's not saying that.</p> <p>23 Q. Okay. It's not saying that one</p> <p>24 of the risk factors is dependent upon</p> <p>25 Madoff?</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 A. You're not getting a guarantee</p> <p>3 on CBOE, but there's the Options Clearing</p> <p>4 Corporation which, within some limits, is</p> <p>5 designed to step in and clear the trade.</p> <p>6 Costs of that end up being assessed. And</p> <p>7 it's certainly not a guarantee.</p> <p>8 On the over-the -- on the</p> <p>9 over-the-counter options, depending on the</p> <p>10 quality of your counterparty you will have</p> <p>11 more or less risk.</p> <p>12 Q. Turning to page 5717.</p> <p>13 Now, sir, do you understand that</p> <p>14 we're now in the portion of the memo</p> <p>15 called "Risk Factors"?</p> <p>16 A. No.</p> <p>17 Q. Confirm that for yourself,</p> <p>18 please.</p> <p>19 A. Okay.</p> <p>20 THE CHAIRMAN: How much longer</p> <p>21 with this document?</p> <p>22 MR. BAMBERGER: I'm sorry.</p> <p>23 THE CHAIRMAN: Are you going to</p> <p>24 be much longer with this document?</p> <p>25 MR. BAMBERGER: Not much longer.</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 Of course it talks about the</p> <p>3 principals of the partnership as well, but</p> <p>4 it's saying another risk factor is</p> <p>5 dependence on Bernie Madoff, correct?</p> <p>6 A. Either one way or the other way.</p> <p>7 You can't have it both ways.</p> <p>8 It says the services of</p> <p>9 Messrs. Kohlberg, Berman, Tucker and Noel,</p> <p>10 and Bernard L. Madoff Investment</p> <p>11 Securities, no longer a Messr., are</p> <p>12 essential to the continued operations of</p> <p>13 the partnership.</p> <p>14 It doesn't say that -- it</p> <p>15 doesn't so much say that they're going to</p> <p>16 make it profitable or unprofitable. It</p> <p>17 says it would be nice if these fellows</p> <p>18 were around if the partnership is to</p> <p>19 continue in operation.</p> <p>20 Q. They say there that they</p> <p>21 delegated all investment management</p> <p>22 decisions to Bernard L. Madoff.</p> <p>23 Do you see that?</p> <p>24 A. Yes. It's a -- it's a very</p> <p>25 narrow mandate. It's a deliberately</p>

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<p style="text-align: right;">174</p> <p>1 Merkin - Direct/Bamberger 2 narrowed mandate. 3 Q. And you did, too? 4 A. That's precisely what I did not 5 do. 6 MR. BAMBERGER: Okay. Just -- 7 again, I'm almost done now. I think 8 we can move this document into 9 evidence, or do I need that confirmed 10 now? 11 Mr. Levander? 12 MR. LEVANDER: I think it's 13 already in evidence. 14 Q. Also it is correct to say that 15 this document disclosed the monthly 16 results on page 17 -- 17 A. I'm sorry, are you directing me 18 to page 17. 19 Q. I am. Page 5717, on the bottom. 20 A. I got it. 21 Q. So an investor who is interested 22 could look at the exact performance of 23 this strategy in time, correct? 24 A. I'm not sure what you're asking 25 me.</p>	<p style="text-align: right;">176</p> <p>1 Merkin - Direct/Bamberger 2 Q. Or a five-year performance? 3 A. I didn't -- what's the 4 difference in the question? I'm sorry. 5 Q. Just the lengths of time. 6 Isn't it typical to give five 7 years' historical returns? 8 A. When we give investors, 9 prospective investors, even existing 10 investors, performance information for 11 Ascot, it may have been in certain cases 12 annual, it may have been certain cases 13 monthly, or quarterly, but in the 14 preponderance -- I mean, they always got 15 something, and it would always be, since 16 inception. 17 Q. My last question before lunch 18 is: 19 Since you clearly could have 20 done so, why did you make the decision not 21 to disclose Bernard Madoff's role or roles 22 for Ascot in your offering memoranda for 23 Ascot? 24 A. The offering -- well, his role 25 was disclosed in later offering memoranda.</p>
<p style="text-align: right;">175</p> <p>1 Merkin - Direct/Bamberger 2 There's monthly performance on 3 page 17 that starts in 1993. 4 Q. You didn't make it a habit to 5 provide every prospective investor in 6 Ascot monthly, quarterly or annual 7 performance of Ascot, correct? 8 A. I almost surely did make it a 9 habit. 10 Q. Uh-hum. You wouldn't dispute 11 that Mr. Moshael Straus never received it, 12 correct? You don't have evidence that he 13 did? 14 A. I can't imagine he didn't if he 15 was an investor. He certainly had 16 returns. 17 Q. I'm talking about when he made 18 his decision as a prospective investor -- 19 A. Oh, I see. 20 Q. -- in March of '99, you're not 21 here to say that you are certain that he 22 got information on Ascot's performance 23 going back to 1992, are you? 24 A. I can't say with certainty that 25 he received that information.</p>	<p style="text-align: right;">177</p> <p>1 Merkin - Direct/Bamberger 2 So if you point me at a specific time, 3 there's three of them or four of them that 4 come down the pike. 5 It's simply unfair to say that 6 it wasn't disclosed in there. 7 The simple reality is Ascot was 8 formed to allocate money to managers who 9 could have low volatility, lower return 10 strategies, they were also very liquid. 11 The primary strategy -- the fact 12 that there was a primary strategy, the use 13 of third parties, the notion that we could 14 give all of that money to one-third party, 15 the custody risk, the notion that all of 16 it could be at one place with custody 17 clearly at that place, are all disclosed 18 in every document since inception, with 19 the primary strategy very, very clearly 20 outlined. 21 In addition to that, I told 22 everybody. And I told virtually every 23 investor in the fund that the monies were, 24 over a long period of time, invested with 25 Madoff.</p>

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<p style="text-align: right;">178</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. We know you certainly didn't</p> <p>3 tell Moshael Straus that. That was in</p> <p>4 your counsel's opening?</p> <p>5 A. Slowly?</p> <p>6 Q. You personally didn't tell</p> <p>7 Moshael Straus that?</p> <p>8 A. I don't recall such a</p> <p>9 conversation.</p> <p>10 If you told me I had told him, I</p> <p>11 certainly would think that that's entirely</p> <p>12 plausible.</p> <p>13 Q. It was in 2006 that your</p> <p>14 offering memorandum for Ascot first makes</p> <p>15 mention of Bernard L. Madoff Investment</p> <p>16 Securities, correct?</p> <p>17 A. I think that's correct.</p> <p>18 Q. And at that time you say he's</p> <p>19 one of two prime brokers for Ascot,</p> <p>20 correct?</p> <p>21 A. I think that's right.</p> <p>22 Q. All right.</p> <p>23 And the other being Morgan</p> <p>24 Stanley & Co.?</p> <p>25 A. Right.</p>	<p style="text-align: right;">180</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 MR. BAMBERGER: Okay, nothing</p> <p>3 else for you right now, prior to</p> <p>4 lunch. Thank you.</p> <p>5 THE CHAIRMAN: We'll break.</p> <p>6 (Luncheon recess: 12:58 p.m.)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">179</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. And you further say that he is</p> <p>3 prime broker, and he is custodian,</p> <p>4 correct?</p> <p>5 A. Correct.</p> <p>6 Q. You do not disclose that he is</p> <p>7 investment manager, correct, yes or no?</p> <p>8 A. I don't remember those words,</p> <p>9 no.</p> <p>10 Q. You do not disclose that he has</p> <p>11 discretion over the Ascot account,</p> <p>12 correct?</p> <p>13 A. I think we emphatically say</p> <p>14 about ten or 12 times in that document --</p> <p>15 Q. Sir, I'm asking you a</p> <p>16 question -- pardon my interruption.</p> <p>17 A. I'm answering your question.</p> <p>18 If you want to interrupt --</p> <p>19 Q. I don't mean to, sir.</p> <p>20 A. We disclosed, probably nine, 10</p> <p>21 or 11 times in that document, the use of</p> <p>22 third parties, and emphasize that those</p> <p>23 third parties could have all the money,</p> <p>24 this is with Madoff, and emphasize very</p> <p>25 clearly that they could have custody.</p>	<p style="text-align: right;">181</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A F T E R N O O N S E S S I O N :</p> <p>3 (Time noted: 1:55 p.m.)</p> <p>4 THE CHAIRMAN: All right, we'll</p> <p>5 resume.</p> <p>6 MR. BAMBERGER: Thank you very</p> <p>7 much, Judge.</p> <p>8 J. E Z R A M E R K I N ,</p> <p>9 resumed, having been previously duly</p> <p>10 affirmed, was examined and testified</p> <p>11 further as follows:</p> <p>12 CONTINUED DIRECT EXAMINATION</p> <p>13 BY MR. BAMBERGER:</p> <p>14 Q. Mr. Merkin, in addition to</p> <p>15 Gabriel and Ariel, which I understand are</p> <p>16 brother/sister funds, and Ascot, in the</p> <p>17 last years of your organization there was</p> <p>18 a fourth entity for which BDO would</p> <p>19 prepare financial statements. And that</p> <p>20 entity was Amber, correct?</p> <p>21 A. Yes.</p> <p>22 Q. Were you or an entity under your</p> <p>23 control the general partner of Amber?</p> <p>24 A. Amber was a corporation. It did</p> <p>25 not have a general partnership. It wasn't</p>

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<p style="text-align: right;">182</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 a partnership. It was a corporation.</p> <p>3 Q. It was a corporation.</p> <p>4 When was that corporation</p> <p>5 formed?</p> <p>6 A. Hmmm, I don't remember. I guess</p> <p>7 early to mid 2000s.</p> <p>8 Q. Can you do any better than that?</p> <p>9 A. If you perhaps suggest a better</p> <p>10 date, it might refresh my memory.</p> <p>11 Q. I wish I could, sir. I don't</p> <p>12 know.</p> <p>13 A. I don't think it was less than</p> <p>14 that. It may have been a little bit</p> <p>15 older than that. It might have been in</p> <p>16 existence by '08 for as much as eight or</p> <p>17 ten years, I just don't remember.</p> <p>18 Q. Your wife is named Lauren</p> <p>19 Merkin, correct?</p> <p>20 A. She is.</p> <p>21 Q. And is she today on the Board of</p> <p>22 Trustees of an entity called AVI CHAI?</p> <p>23 A. She is.</p> <p>24 Q. Has she been on the Board of</p> <p>25 Trustees of AVI CHAI for many years?</p>	<p style="text-align: right;">184</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Why did you form Amber, sir?</p> <p>3 A. Amber was formed with the</p> <p>4 objective of asking investors in Amber,</p> <p>5 shareholders in Amber, for a much longer</p> <p>6 lockup than we might have had in Gabriel</p> <p>7 or Ariel at that time.</p> <p>8 And to then pursue strategies</p> <p>9 that deliberately eschewed any objective</p> <p>10 of managing the liquidity of the</p> <p>11 portfolio.</p> <p>12 Q. What was the lockup applicable</p> <p>13 to Amber?</p> <p>14 A. At the beginning I think it was</p> <p>15 three years, and then I think it could</p> <p>16 be -- if I remember correctly, and I'm not</p> <p>17 sure I do -- it might also have</p> <p>18 extensions.</p> <p>19 Q. Did you offer Amber in general</p> <p>20 to prospective investors in your capital</p> <p>21 group?</p> <p>22 A. It certainly wasn't -- if it</p> <p>23 sounded -- I would say that they were</p> <p>24 generally, yes. Specifically, I don't</p> <p>25 remember specific circumstances.</p>
<p style="text-align: right;">183</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. Yes.</p> <p>3 Q. Is or was AVI CHAI an investor</p> <p>4 in Amber?</p> <p>5 A. Yes.</p> <p>6 Q. Is it correct to say that at no</p> <p>7 time Amber had any Madoff exposure?</p> <p>8 A. Yes, that's correct.</p> <p>9 Q. If you know, how big an</p> <p>10 investment did AVI CHAI initially make in</p> <p>11 Amber?</p> <p>12 A. Some multiple of 10 million. I</p> <p>13 don't remember the exact number.</p> <p>14 Mid-multiple. I just don't remember.</p> <p>15 Q. Now, the records that have been</p> <p>16 produced in this case -- and here I will</p> <p>17 suggest to you that I think I read in the</p> <p>18 records -- that the Leon Levy Foundation</p> <p>19 was also an investor in Amber.</p> <p>20 Does that accord with your</p> <p>21 recollection?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. When he was alive was</p> <p>24 Leon Levy also an investor in Amber?</p> <p>25 A. I don't think so.</p>	<p style="text-align: right;">185</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Correct to say that it never had</p> <p>3 a dollar of Madoff exposure for the</p> <p>4 existence of the corporation?</p> <p>5 A. I'm sorry?</p> <p>6 Q. Is it correct to say it never</p> <p>7 had any exposure to Madoff in its life?</p> <p>8 A. Amber?</p> <p>9 Q. Amber.</p> <p>10 A. Yes.</p> <p>11 Q. Correct to say that Amber in</p> <p>12 general invested side by side with Gabriel</p> <p>13 Partners LP?</p> <p>14 A. In the sense that I take that,</p> <p>15 no, that's not correct.</p> <p>16 Q. And in the sense that I would</p> <p>17 take it -- I'm kidding with you, sir.</p> <p>18 That was meant as a joke. It's not funny.</p> <p>19 When I say "side by side," there</p> <p>20 are many complexities. One can be a</p> <p>21 co-investor. One can invest in a common</p> <p>22 fund. There are various different ways to</p> <p>23 do it mechanically for various different</p> <p>24 reasons.</p> <p>25 But is it not correct to say</p>

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<p style="text-align: right;">186</p> <p>1 Merkin - Direct/Bamberger 2 that basically the private equity 3 investments that Gabriel made Amber would 4 also participate in? 5 A. You mean Gabriel Capital LP? 6 Q. Yes. 7 A. The purpose of Amber was to 8 focus very deliberately on the highly 9 illiquid and very long time to resolve 10 positions. 11 And, therefore, because it asked 12 for a lockup, there was no need to manage 13 the liquid of the portfolio. 14 It was very clear to all Amber 15 prospective investors and investors that 16 should Amber decide to invest in a 17 transaction in which Gabriel was also 18 deciding to invest in, it would be pari 19 passu'd by available buying power with any 20 of our groups that invested in that 21 position. 22 Amber could not in any way 23 disadvantage investors in an existing 24 fund. 25 Q. Understood, thank you.</p>	<p style="text-align: right;">188</p> <p>1 Merkin - Direct/Bamberger 2 might be real estate-related. 3 Generally, the focus was on 4 private equity. 5 Q. Some of the names that you've 6 just given me, could they be distressed 7 investments, too, or not necessarily? 8 A. Well, the real private equity 9 wasn't. It certainly wasn't intended to 10 be. 11 By the time Amber came into 12 existence it was partly created because of 13 the liquidity of the mainstream 14 opportunities that we were seeing in 15 Gabriel had moved sequentially down. 16 In other words, the things that 17 we were doing way back -- let's say, for 18 example, merger arbitrage, were a 19 relatively liquid strategy. 20 We moved to distressed and 21 bankruptcies, less liquid than merger 22 arbitrage, but more liquid in the sense 23 that it involved, at least in part, public 24 securities, than some of the things we 25 were doing in private equity, or some of</p>
<p style="text-align: right;">187</p> <p>1 Merkin - Direct/Bamberger 2 A. It was not, as I would take it 3 to mean, side by side. 4 Q. Can you identify other major 5 investments that were made by both Gabriel 6 and Amber? 7 A. What period are you talking 8 about? 9 Q. From the inception of Amber. 10 A. A whole list, since the 11 beginning of Amber's existence? 12 Q. I would assume the list is not 13 too long, but you can tell me. 14 Would Bank Leumi be one? 15 A. Yes. 16 Q. Would investments in GMAC be 17 another? 18 A. Yes. 19 Q. Help me, sir. What were the 20 other common investments made by Gabriel 21 and Amber? 22 A. Chrysler, Talecris, a Japanese 23 bank, an Austrian bank, several 24 domestic -- meaning not overseas -- 25 financial entities. Some things that</p>	<p style="text-align: right;">189</p> <p>1 Merkin - Direct/Bamberger 2 the things that we were doing in debt 3 pieces that we originated and were 4 completely private. 5 Q. For the periods of time that 6 Amber was awaiting the consummation of an 7 investment, how would it allocate its 8 cash? Into what kinds of investments? 9 A. I don't think Amber ever had a 10 whole lot of cash. 11 Q. But when it did have cash, what 12 would you do with it? 13 A. It would probably sit in an 14 account of Morgan Stanley or would own 15 even Morgan Stanley paper -- I just don't 16 know. I don't remember. 17 Q. To get it an enhanced return why 18 didn't you put it with Bernard Madoff? 19 A. Well, the objective of Amber was 20 not to get an enhanced return on its cash, 21 nor was that, frankly, the reason we had 22 money necessarily with Madoff in Gabriel. 23 The purpose of Amber, as I just 24 said, was to invest in highly illiquid 25 attractive investments with the strength</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 and the benefit of a very long lockup.</p> <p>3 Q. Why did it make sense to put up</p> <p>4 to 30 to 35 percent of Gabriel's assets in</p> <p>5 Madoff?</p> <p>6 A. I'm not sure the percentage was</p> <p>7 anything near that high.</p> <p>8 The role of the Madoff positions</p> <p>9 in the Gabriel portfolio was we saw those</p> <p>10 positions as an interesting alternative</p> <p>11 for a portion of our liquidity</p> <p>12 requirement.</p> <p>13 And as we managed the liquidity</p> <p>14 of the portfolio, and as other pieces of</p> <p>15 the portfolio became increasingly</p> <p>16 attractive and increasingly illiquid, it</p> <p>17 was an interesting alternative to our</p> <p>18 liquidity in management.</p> <p>19 Q. Correct to say that one of the</p> <p>20 persons associated with AVI CHAI told you,</p> <p>21 in words or substance, that they did not</p> <p>22 want Madoff exposure; true?</p> <p>23 A. No, I don't think so.</p> <p>24 Q. Now, sir, you produced certainly</p> <p>25 e-mails in this case indicating that</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 management to enable us to offer to</p> <p>3 investors, was what they came to Gabriel</p> <p>4 for.</p> <p>5 Q. Okay.</p> <p>6 Sir, in the volume still before</p> <p>7 you --</p> <p>8 A. Actually, it isn't. It's</p> <p>9 probably right here.</p> <p>10 Q. If you can take it back,</p> <p>11 please. I think we're still working out</p> <p>12 of Volume 2.</p> <p>13 A. Okay.</p> <p>14 Q. Let's finish with that.</p> <p>15 A. Just one second. I have to go</p> <p>16 off a step.</p> <p>17 Q. Turning your attention to tab</p> <p>18 57, please.</p> <p>19 (The witness complies.)</p> <p>20 Q. This seems to be a stand-alone</p> <p>21 paragraph drawn from one of the earlier</p> <p>22 Fairfield Sentry documents we talked</p> <p>23 about, describing the strategy. Do you</p> <p>24 see that? It seems to be drawn out of</p> <p>25 Exhibit 50.</p>
191	193
<p>1 Merkin - Direct/Bamberger</p> <p>2 actual and prospective investors in Ascot,</p> <p>3 at least some of them, knew that Ascot was</p> <p>4 a Madoff strategy.</p> <p>5 But were you equally as</p> <p>6 forthcoming with individuals that invested</p> <p>7 in Gabriel that Madoff was playing a role</p> <p>8 there, too?</p> <p>9 A. I'm not sure what you're asking.</p> <p>10 Discussions of Gabriel very, very rarely</p> <p>11 focused on the Madoff role.</p> <p>12 It was a tool for liquidity</p> <p>13 management. It wasn't, let's say, the</p> <p>14 characterizing portions of the portfolio.</p> <p>15 It surely wasn't where we thought we were</p> <p>16 taking risk.</p> <p>17 The risk to opening capital in</p> <p>18 any quarter that we had capital with</p> <p>19 Madoff for Gabriel probably didn't exceed</p> <p>20 a half a percent. And surely never made</p> <p>21 it to a percent. But I don't think --</p> <p>22 honestly don't think it got up above a</p> <p>23 half-percent. And it wasn't what people</p> <p>24 came to Gabriel for.</p> <p>25 It was a tool of liquidity</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 A. Can I take a look at Exhibit 50?</p> <p>3 Q. Let me represent to you that</p> <p>4 it's the same.</p> <p>5 A. Fine with me.</p> <p>6 This is the same that we looked</p> <p>7 at in that opening paragraph in 50?</p> <p>8 Q. Yes.</p> <p>9 A. I'm surprised to see that.</p> <p>10 Q. Do you know what the purpose was</p> <p>11 of Exhibit 57?</p> <p>12 A. No. Where did this come from?</p> <p>13 Q. Well, out of your files, is all</p> <p>14 I can say.</p> <p>15 A. Let me take a look at it for one</p> <p>16 moment?</p> <p>17 Q. Sure.</p> <p>18 (The witness reviews document.)</p> <p>19 A. No.</p> <p>20 Q. No recollection as to why it</p> <p>21 might have been snipped for any purpose</p> <p>22 that you can think of?</p> <p>23 A. I just don't remember.</p> <p>24 MR. BAMBERGER: I would like to</p> <p>25 mark it into evidence, Mr. Levander.</p>

49 (Pages 190 to 193)

<p style="text-align: right;">194</p> <p>1 Merkin - Direct/Bamberger 2 MR. LEVANDER: Again, I don't 3 know what the relevance is, but no 4 objection. 5 MR. BAMBERGER: Thank you. 6 (Claimant's Exhibit 57, received 7 in evidence.) 8 BY MR. BAMBERGER: 9 Q. Turning to 58, is that your 10 handwriting on that page? 11 MR. LEVANDER: What exhibit? 12 I'm sorry. 13 MR. BAMBERGER: Exhibit 58, 14 Mr. Levander. 15 Q. This is another page from your 16 diligence file. 17 (The witness reviews document.) 18 A. Just one moment. 19 Q. Can you tell us, is that your 20 handwriting? 21 A. Tab 58? 22 Q. Yes. Top right-hand corner of 23 58. 24 A. Yeah, that looks like my 25 handwriting.</p>	<p style="text-align: right;">196</p> <p>1 Merkin - Direct/Bamberger 2 down on the bottom. 3 Q. Do you have a recollection as to 4 why or how this document came into your 5 diligence file? 6 A. A personal guess, by fax. But I 7 don't remember. 8 Q. King Gate was another Madoff 9 feeder fun? 10 A. Yes. 11 Q. As was Thema? 12 A. I have to go back and look. I 13 don't remember Thema by name. But it 14 certainly looks that way from the very 15 brief second I took a look at the page -- 16 MR. BAMBERGER: I move 59 into 17 evidence. 18 Claimant moves 59 into evidence. 19 MR. LEVANDER: Same comment; no 20 objection. 21 (Claimant's Exhibit 59, received 22 in evidence.) 23 BY MR. BAMBERGER: 24 Q. Mr. Merkin, I would like to 25 direct your attention to Exhibit 60,</p>
<p style="text-align: right;">195</p> <p>1 Merkin - Direct/Bamberger 2 Q. You were collecting information 3 about the monthly performance of other 4 Madoff strategies? 5 A. I doubt I was collecting it. My 6 guess is somebody sent it to me and I put 7 it in the file. 8 Q. Did you look at it? 9 A. I don't remember. 10 MR. BAMBERGER: I move that into 11 evidence, please. 12 THE WITNESS: Likely, yes. 13 MR. LEVANDER: No objection; 14 same comment. 15 MR. BAMBERGER: Can we do that? 16 Can we say that all my exhibits are 17 irrelevant, unless you say so? 18 (Claimant's Exhibit 58, received 19 in evidence.) 20 BY MR. BAMBERGER: 21 Q. Can you turn to page 59? This 22 was produced out of your diligence file. 23 It appears to have been sent by Tremont 24 Advisors. Do you see that on the bottom? 25 A. I see "Tremont Advisors" upside</p>	<p style="text-align: right;">197</p> <p>1 Merkin - Direct/Bamberger 2 please. 3 Is that your handwriting on the 4 top? 5 A. On the top the date isn't and 6 the name is. 7 Q. This document runs -- one, two, 8 three, four, five -- six pages. And if 9 you could go to the last two pages, do you 10 see in the bottom, or the last three 11 pages, there's a bracket and the word 12 "out"? 13 Do you see that? 14 A. I'm on the wrong page -- oh, I 15 see. This is the second-to-the-last page? 16 Q. Yes. The last three pages I see 17 on the bottom, "out," "out," "out." 18 Do you see that? 19 A. Yes. 20 Q. And that's your handwriting, 21 isn't it? 22 A. It looks like it, yes. 23 Q. And the top, about comparing 24 Primeo manager, Series B, the word "out" 25 also appears, correct?</p>

50 (Pages 194 to 197)

198	200
<p>1 Merkin - Direct/Bamberger 2 A. You are on 5457? 3 Q. I am. 4 A. Yes. 5 Q. And that's also true of 5458? 6 A. Yes. 7 Q. Okay. Now, pointing that out, 8 can you recollect how you might have used 9 this document? 10 Did you, for example, instruct 11 your personnel to remove that information 12 and use it for a presentation, for 13 example? 14 A. I doubt it. But I don't 15 remember. 16 Q. Why would you instruct someone 17 to take out something on the top and the 18 bottom of a page like this? 19 A. I'm not sure I did. 20 Q. That is your handwriting, "out"? 21 A. That's a bracket in my 22 handwriting. I don't remember telling him 23 to take it out. 24 Q. Why does it say "out" there, 25 sir?</p>	<p>1 Merkin - Direct/Bamberger 2 A. I'm not suggesting that. 3 Q. Right. But I wanted to be 4 clear. 5 A. These circles around "Primeo," 6 these brackets, they certainly don't look 7 like mine. I just don't know. 8 The uncompleted brackets in the 9 right-hand corner, 5455, I don't know what 10 that's from. 11 Q. Primeo was another Madoff feeder 12 fund? 13 A. I would assume so. Primeo -- I 14 would assume I knew that at some point. 15 Sitting here today, it rings a 16 bell. 17 Q. Look at the top of page 5454. 18 Assuming the accuracy of the 19 document, Madoff's returns looks like a 20 bond, doesn't it? 21 A. You wanted to ask me something 22 about 5454, something that looked like a 23 bomb? 24 Q. A bond, at the top. 25 A. I thought you were being...</p>
199	201
<p>1 Merkin - Direct/Bamberger 2 A. I have no idea. 3 Q. You have no idea? 4 A. (No response.) 5 Q. Okay. Anyway, this document is 6 a more in-depth analysis of Mr. Madoff's 7 amazing returns than some of the others we 8 looked at, correct? 9 A. I would have to look at it. 10 Q. When it came in did you look at 11 it? 12 A. As I sit here today, I don't 13 remember. It looks like it came in 14 '96, and it speaks for the period of time 15 from '89 to the end of 1995. So that 16 would be a pretty good guess as to when it 17 came in. 18 I don't remember looking at it, 19 I don't remember what use I put this to, 20 if any, and I just don't remember. 21 Q. Okay. 22 A. And I'm not sure all these marks 23 are mine. 24 Q. In this case I should represent 25 that none of them are mine.</p>	<p>1 Merkin - Direct/Bamberger 2 Explain to me what you mean by 3 that. 4 Q. I'll withdraw it. 5 On the bottom you see 6 performance versus the S&P 500? 7 A. Yes. 8 Q. And this strategy only has 9 one/seventh of the down months of the S&P 10 500, correct? 11 A. Just one moment. 12 Q. I did that wrong? 13 A. It doesn't look that way to me. 14 Q. No. A 9, right? 15 A. I think it's closer to a 10 in 16 that sentence I think. 17 Q. To me it looks exactly like a 9. 18 But I could be wrong again. One to 9. 19 But we needn't go about that. 20 On the top, this performance is 21 essentially twice the performance of the 22 S&P 500 over the period depicted? 23 A. We're back on that line on the 24 top? 25 Q. The page 5455. Trying to go</p>

51 (Pages 198 to 201)

202	204
<p>1 Merkin - Direct/Bamberger 2 quickly. 3 A. No. It's about 50 percent 4 better. 5 Q. Ah, yes. 6 And 3 is a graph of 7 multi-performance of manager while the S&P 8 500 was down, correct? 9 A. 3 isn't a graph. 10 Q. Right. Chart. 11 A. It's a table. 12 Whoever Manager B is, is set 13 forth next to the S&P 500 for that month. 14 Q. Now, when you wrote "out," and 15 put this in the file called "Madoff," did 16 you have any question in your own mind as 17 to who Manager B was? 18 A. I'm -- I assume some very small 19 question, but it's pretty likely that I 20 thought it was Madoff. 21 Q. Do you recall who your contact 22 was at Primeo? 23 A. I'm not sure I remember who 24 Primeo is. If it is who I think it is, 25 then I recall the contact.</p>	<p>1 Merkin - Direct/Bamberger 2 Q. Now, would you agree that the -- 3 this chart shows remarkable performance by 4 the manager, extraordinary performance by 5 the manager; true? 6 A. No. It probably shows the 7 opposite. It shows good performance, but 8 nothing better than that. Probably middle 9 of the pack. And not remarkable and not 10 wonderful, off of the figures that appear 11 beneath the column marked Manager B in the 12 table that's number 3. 13 Beneath that column, it is good, 14 and not extraordinary. 15 Q. Wouldn't you agree it's quite 16 one thing for Mr. Madoff to report results 17 around 20 percent or so per annum in the 18 second half of the nineties, when Clinton 19 wins his second term, and we're not 20 actually running a deficit for those 21 years? Do you recall those years -- the 22 impeachment proceedings -- 23 A. So we're way past '95, which is 24 the end of the table. You just have to 25 focus me --</p>
203	205
<p>1 Merkin - Direct/Bamberger 2 Q. Look at the bottom of 5455 of 3 August '90. 4 A. Just one second. The bottom of 5 5455, August '90? 6 Q. Yes. 7 A. Just wait, wait, wait. Because 8 you go too fast and then I make mistakes. 9 August '90. Got it. 10 Q. Do you see there's a difference 11 of more than 15 percentage points in the 12 performance of Manager B versus the S&P 13 500 in that single month? 14 A. Yes. 15 Q. You thought that was arbitrage, 16 sir? 17 A. You didn't ask me whether I 18 thought that was arbitrage. 19 Q. Now I am. 20 A. What's your question? 21 Q. Did you ever investigate how he 22 could perform so much better than the S&P 23 500 in that month? 24 A. Yes. I don't recall 25 specifically that month.</p>	<p>1 Merkin - Direct/Bamberger 2 Q. I know I'm going fast. 3 Do you agree it's a horse of a 4 different color to produce annualized 5 returns of around 20 percent a year during 6 the second half of the nineties than it 7 was in the first half of the nineties; 8 true? Using the same strategy? 9 A. The art in the strategy is to 10 catch the turn. 11 I would have to take a look and 12 see what -- how extended the potential 13 turns were, how frequent, how high. 14 So, for example, take your 15 August '90 comparison, which I know is not 16 the second half of the decade. If 17 something happened intra-August that 18 permitted a return, because sharp down 19 markets are often very volatile, that 20 would have been less extraordinary than 21 your question suggested. 22 Q. When you were a lad, did you 23 work in your father's brokerage firm? 24 A. No. 25 Q. Did you ever go down and</p>

52 (Pages 202 to 205)

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<p style="text-align: right;">206</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 visit it?</p> <p>3 A. Yes.</p> <p>4 Q. He had a seat on the New York</p> <p>5 Stock Exchange, the American Stock</p> <p>6 Exchange?</p> <p>7 A. Yes.</p> <p>8 Q. Did you ever work summers there?</p> <p>9 A. Yes.</p> <p>10 Q. Did you ever go down to the</p> <p>11 trading floor?</p> <p>12 A. Yes.</p> <p>13 Q. So you had a general awareness</p> <p>14 of the specialist system?</p> <p>15 A. General would be a good word,</p> <p>16 yes.</p> <p>17 Q. Agree that it's one thing to</p> <p>18 predict the future prices of relatively</p> <p>19 thinly traded stocks, but when you're</p> <p>20 talking about the giant stocks, with tens</p> <p>21 and tens of billions of dollars of market</p> <p>22 capitalization, there's no man alive that</p> <p>23 can predict when to get in that market to</p> <p>24 make money and when to get out? There's</p> <p>25 no man who can do it?</p>	<p style="text-align: right;">208</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 that and eventually did business with</p> <p>3 Madoff, when they saw that he could fill</p> <p>4 orders at this price, correct?</p> <p>5 A. Yes. He built order flow</p> <p>6 through executions.</p> <p>7 Q. And essentially he'd actually</p> <p>8 rebate a penny to his major clients who</p> <p>9 were placing orders through him as opposed</p> <p>10 to going on the Exchange, correct?</p> <p>11 A. I think that comes at a later</p> <p>12 time than you're talking about, and stops.</p> <p>13 But, yes, for a short period of time he</p> <p>14 did that.</p> <p>15 Q. But all he could offer people</p> <p>16 was maybe a penny here or a penny there in</p> <p>17 their execution. He had no ability to</p> <p>18 make an unprofitable investment</p> <p>19 profitable. All he could do is get you a</p> <p>20 slightly better price on a big trade you</p> <p>21 wanted to place, and business like that</p> <p>22 migrated to him, correct?</p> <p>23 A. He certainly had no ability to</p> <p>24 take an unprofitable trade and make it</p> <p>25 profitable.</p>
<p style="text-align: right;">207</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. I would totally disagree. The</p> <p>3 more heavily a stock, the more easy it is</p> <p>4 to predict a pattern.</p> <p>5 When you have a thinly traded</p> <p>6 stock you have no data points and it's</p> <p>7 very hard to construct a real pattern.</p> <p>8 Q. Let's say you're superior at</p> <p>9 execution. And everyone agrees that</p> <p>10 Bernard Madoff was, right?</p> <p>11 A. Yes.</p> <p>12 Q. Your counsel has said in other</p> <p>13 cases and other contexts he broke the</p> <p>14 monopoly on the Big Board.</p> <p>15 No dispute about that, right?</p> <p>16 A. Yes.</p> <p>17 Q. And he did that by making better</p> <p>18 prices on the NYSE-listed stocks, making</p> <p>19 that market off-Exchange, correct?</p> <p>20 A. Essentially.</p> <p>21 Q. So what he could do by doing</p> <p>22 that was just getting a little bit of</p> <p>23 better execution than those specialists on</p> <p>24 the NYSE. And people, particularly the</p> <p>25 discount brokerages, were attracted to</p>	<p style="text-align: right;">209</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 He had order flow. With order</p> <p>3 flow comes market share. With market</p> <p>4 share comes additional order flow.</p> <p>5 And he built up dominant market</p> <p>6 share in his name from a far higher</p> <p>7 percentage than the already high</p> <p>8 percentage he had in the overall Stock</p> <p>9 Exchange trading.</p> <p>10 With order flow comes some sense</p> <p>11 of market events, market timing, market</p> <p>12 predictability, to some extents computer</p> <p>13 aided and to some extent, to a lesser</p> <p>14 extent, just sheer experience.</p> <p>15 Q. Sir, Goldman Sachs is out there,</p> <p>16 Morgan Stanley is out there, there are</p> <p>17 dozens and dozens of firms that have way</p> <p>18 more capability than this other man with a</p> <p>19 black box, right?</p> <p>20 A. Well, I wasn't describing a</p> <p>21 black box. The question of how he could</p> <p>22 compete with the Street, in the sense that</p> <p>23 I think you just intended it, is something</p> <p>24 I discussed with him more than once.</p> <p>25 And his view was that the little</p>

53 (Pages 206 to 209)

<p style="text-align: right;">210</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 guys didn't have the flow, and the bigger</p> <p>3 guys, who might have had the flow, had</p> <p>4 either regulatory disabilities that took</p> <p>5 them out of the flow game or simply had</p> <p>6 restricted lists.</p> <p>7 He had no advisory business. He</p> <p>8 had nothing that said you can't trade IBM</p> <p>9 because you're their decades-long banker</p> <p>10 and you're doing a financing and you're</p> <p>11 doing advisory work on a transaction.</p> <p>12 So that where he was, he said,</p> <p>13 really unusually well situated is he had</p> <p>14 the order flow of the big guys without any</p> <p>15 of their regulatory or legal restrictions.</p> <p>16 Q. And that would give you an</p> <p>17 advantage, sir, for about ten minutes; you</p> <p>18 knew that?</p> <p>19 A. Well, I think it's much longer</p> <p>20 than ten minutes. But a real ten-minute</p> <p>21 edge in the trading business you may think</p> <p>22 is a penny here and a penny there, but on</p> <p>23 volumes of shares it's a phenomenal amount</p> <p>24 of money.</p> <p>25 Q. No, sir. I disagree with you.</p>	<p style="text-align: right;">212</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 we've looked at here --</p> <p>3 A. I've said nothing of '99.</p> <p>4 That's not on the chart.</p> <p>5 Q. August '90.</p> <p>6 A. I said nothing about superior</p> <p>7 executions explaining a return or a result</p> <p>8 that is now 22 years ago, and I just don't</p> <p>9 remember.</p> <p>10 I did say that superior</p> <p>11 executions, combined with some of the</p> <p>12 other things we talked about before lunch,</p> <p>13 in my opinion accounted for the returns in</p> <p>14 a very full and complete way. It is not</p> <p>15 superior executions all by itself. And I</p> <p>16 never suggested that it was.</p> <p>17 Q. No, you didn't.</p> <p>18 How do you arbitrage a basket of</p> <p>19 50 stocks that are supposed to correlate</p> <p>20 to 95 percent of the portfolio of the S&P</p> <p>21 100? How could you arbitrage that?</p> <p>22 A. Because you had flexibility to</p> <p>23 emphasize near-term performance of certain</p> <p>24 stocks in certain sectors. Exactly as the</p> <p>25 directive lays out.</p>
<p style="text-align: right;">211</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. I think you're wrong. I think</p> <p>3 you're seriously wrong.</p> <p>4 Q. Well, I think you're seriously</p> <p>5 wrong, so that makes two of us.</p> <p>6 MR. LEVANDER: We can swear him</p> <p>7 in and I can cross-examine him.</p> <p>8 THE CHAIRMAN: We don't want you</p> <p>9 arguing with the witness.</p> <p>10 A. If you're telling me he had a</p> <p>11 ten-minute advantage, that's a huge thing.</p> <p>12 It's a huge thing to anybody in the</p> <p>13 business. And I'm not telling you it's</p> <p>14 ten minutes.</p> <p>15 Q. Maybe it was less than ten</p> <p>16 minutes. Maybe it was a minute. We'll</p> <p>17 hear from the experts who know.</p> <p>18 But you know that superior</p> <p>19 execution --</p> <p>20 A. Superior -- I didn't hear?</p> <p>21 Q. Superior execution --</p> <p>22 A. Right.</p> <p>23 Q. -- hardly explains the results</p> <p>24 of August '99, and hardly explains the</p> <p>25 results on the rest of the chart that</p>	<p style="text-align: right;">213</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 MR. BAMBERGER: I move Exhibit</p> <p>3 60 into evidence, please.</p> <p>4 MR. LEVANDER: No objection.</p> <p>5 Continuing relevance question.</p> <p>6 (Claimant's Exhibit 60, received</p> <p>7 in evidence.)</p> <p>8 MR. BAMBERGER: Do you object to</p> <p>9 61 on relevance grounds?</p> <p>10 MR. LEVANDER: You may ask away.</p> <p>11 BY MR. BAMBERGER:</p> <p>12 Q. Sir, turning your attention to</p> <p>13 tab 61, please --</p> <p>14 A. Tab 61.</p> <p>15 Q. -- now, this is the article in</p> <p>16 MARHedge that appeared, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And you received it when it was</p> <p>19 published in May of 2001?</p> <p>20 A. No, I don't think so.</p> <p>21 Q. When did you receive it?</p> <p>22 A. Sometime after that. I didn't</p> <p>23 subscribe to MARHedge. I didn't read</p> <p>24 MARHedge. I've read one or two MARHedge</p> <p>25 articles in my life.</p>

54 (Pages 210 to 213)

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<p>1 Merkin - Direct/Bamberger 2 MARHedge is an industry rag 3 that's mostly a gossip sheet, and a friend 4 of mine sent it to me some time after its 5 appearance. 6 Q. I would love it if you'd answer 7 my question. I guess I understand. 8 A. Okay. 9 Q. Did you receive it in the month 10 of May of 2001? 11 A. In the month of May? 12 Q. Yes. 13 A. I doubt it. 14 MR. BAMBERGER: Okay, I move 61 15 into evidence. 16 MR. LEVANDER: I previously said 17 there's no objection. 18 (Claimant's Exhibit 61, received 19 in evidence.) 20 BY MR. BAMBERGER: 21 Q. Did you receive it in June of 22 2001? 23 A. I don't remember. 24 Q. Could you look at tab 62, 25 please.</p>	<p>1 Merkin - Direct/Bamberger 2 Q. What's his business? 3 A. I believe he's an accountant. 4 Q. Did he play any role with 5 Gabriel Capital Group? 6 A. No. 7 Q. Who is Naomi Ferro? 8 A. My secretary. 9 Q. Why is he bcc'ing your 10 secretary, if you know? 11 A. I don't know. 12 Q. Further in Exhibit 62 there's a 13 second version of the same Barrons 14 article, and this is sent just to you; it 15 doesn't show the bcc. 16 So I assume this is the one that 17 you received, you personally received on 18 your computer? 19 (The witness reviews document.) 20 A. It's a good guess. I don't 21 know. 22 Q. And the Barrons article does 23 refer to the MARHedge publication as a 24 trade publication, in the third paragraph? 25 A. Just one moment.</p>
215	217
<p>1 Merkin - Direct/Bamberger 2 (The witness complies.) 3 Q. Now, sir, correct to say that 4 the article in Barrons -- and this is the 5 on-line version -- was published after the 6 MARHedge article was published; true? 7 A. I believe so, yes. 8 Q. Okay. 9 A. I believe just a summary of the 10 MARHedge article. 11 Q. Well, it will speak for itself. 12 Anyway, Gerry Balsam sent it to 13 you? That's at the top of Exhibit 62? 14 A. Yes. 15 Q. And in this case -- and there's 16 another version of it a little bit later. 17 In this case he cc's Naomi Ferro 18 and Jack Balsam? 19 A. Bcc's. 20 Q. Did I not say that? 21 A. I don't know. 22 Q. I need coffee. 23 In that case, he bcc's it. 24 Who is Jack Balsam? 25 A. I believe it is his father.</p>	<p>1 Merkin - Direct/Bamberger 2 (The witness reads document.) 3 A. Yes, it does. 4 Q. And would it be natural to say, 5 sir, if you saw that in Barrons -- you 6 don't say Barrons is an industry rag, do 7 you, sir? 8 A. I do. 9 Q. Barrons is also an industry rag? 10 A. I didn't say it's an also an 11 industry rag. It's a different 12 publication, but it has a rag quality to 13 it to some extent. 14 Q. Uh-hum. 15 A. It's nothing near as raggy as 16 MARHedge. 17 Q. You understood that one theme in 18 the Barrons article that Bernie Madoff 19 just didn't want people knowing what he 20 was doing, that that's something that you 21 had experienced as well, correct? He 22 wanted secrecy, to the extent he could 23 obtain it; true? 24 A. Certainly not from me. 25 Q. Did you ever ask him why he</p>

55 (Pages 214 to 217)

<p style="text-align: right;">218</p> <p>1 Merkin - Direct/Bamberger 2 wanted such secrecy? 3 MR. LEVANDER: Objection. He 4 just said he didn't ask him that. 5 So I don't know how he can begin 6 to answer the next question. 7 MR. BAMBERGER: I can withdraw 8 the question. 9 THE CHAIRMAN: I was just going 10 to just sustain the objection and ask 11 you to rephrase it. 12 BY MR. BAMBERGER: 13 Q. Now, when you read the MARHedge 14 article was there anything in that article 15 that you didn't know? 16 A. I'm sure there was. 17 Q. And what specifically? 18 A. I don't remember it. But there 19 must have been something in there that I 20 didn't know. 21 Q. When you read it, I take it you 22 noticed the comment on the bottom of page 23 4923, left-hand column: "Throughout the 24 entire period Madoff has managed the 25 assets, the strategy, which claims to use</p>	<p style="text-align: right;">220</p> <p>1 Merkin - Direct/Bamberger 2 Q. This is a quite extensive cover 3 story, correct, sir? It runs four pages? 4 A. It runs four pages. 5 Q. It certainly grabbed your 6 attention because at this time you had 7 upwards of a billion dollars with 8 Mr. Madoff, correct? 9 A. I would have read any article 10 that was four pages on Mr. Madoff. 11 Q. Correct to say that it was your 12 understanding that you were the second or 13 third biggest feeder fund to him at that 14 time; that is, Ascot? 15 A. Not remotely. 16 Q. At the time? You didn't believe 17 you were? 18 A. I don't think so. 19 Q. All right. 20 And, then, turning your 21 attention to that paragraph that I read, 22 when you read that, that he claimed to use 23 almost exclusively OTC options, that was a 24 surprise to you, correct, sir? 25 A. I'm sorry, you're asking me</p>
<p style="text-align: right;">219</p> <p>1 Merkin - Direct/Bamberger 2 OTC options almost entirely, has appeared 3 to work with remarkable results." 4 Do you see that? 5 A. I see it. 6 Q. Okay. Well, when you read that, 7 you said -- just so we're clear, that that 8 second page, in the left-hand column, 9 under the word "Hedge," I just read to you 10 the second full paragraph on the bottom. 11 MR. FLEMING: Can you give a 12 page? 13 MR. BAMBERGER: It's tab 61 -- 14 MR. FLEMING: It's a different 15 page. 16 MR. BAMBERGER: I'm sorry. I 17 don't think I said it. Tab 61 in the 18 MARHedge article. 19 MR. FLEMING: Which page in the 20 paragraph? 21 THE CHAIRMAN: Second page. 22 MR. MILLSON: Second paragraph 23 from the bottom. 24 MR. FLEMING: Thank you. 25 BY MR. BAMBERGER:</p>	<p style="text-align: right;">221</p> <p>1 Merkin - Direct/Bamberger 2 about the same paragraph you read before? 3 Q. I am. But I neglected to point 4 out to the Chairman where I was, so I'm 5 going to do it again. 6 A. Okay. 7 Q. When you read that paragraph 8 that was a surprise to you, sir, wasn't 9 it? 10 A. I don't remember as I sit here 11 today what my reaction was when I read 12 that paragraph. 13 If there was something that 14 caught my attention -- 15 Q. I'm only going to ask you about 16 this paragraph. 17 You don't recall being 18 surprised? 19 A. As I sit here today I just don't 20 recall what my sort of response was or 21 reaction was or reply was when I read that 22 paragraph. 23 Q. Let me suggest to you, sir, that 24 you must have been surprised, because your 25 finance staff, under the guidance of</p>

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<p style="text-align: right;">222</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Mr. Autera, had been receiving</p> <p>3 confirmations for options transactions for</p> <p>4 years, and they always had the CBOE CUSIP</p> <p>5 number on them.</p> <p>6 A. Well, what I started to say was</p> <p>7 if I had been surprised by anything, as I</p> <p>8 sit here today, it's the "almost entirely"</p> <p>9 language.</p> <p>10 Q. Because you thought it was</p> <p>11 entirely over-the-counter?</p> <p>12 A. No. Because I thought it was a</p> <p>13 mix of listed and unlisted options.</p> <p>14 Q. And by "mixed" you mean pretty</p> <p>15 close to 50/50, or 80 percent CBOE and 20</p> <p>16 percent over-the-counter, or you're not</p> <p>17 really sure?</p> <p>18 A. I don't recall as I sit here</p> <p>19 today.</p> <p>20 I do recall that I did go to see</p> <p>21 Mr. Madoff, if not entirely, in part, to</p> <p>22 discuss this article with him. And the</p> <p>23 question of options, CBOE, meaning, you</p> <p>24 know, listed or unlisted options, came up</p> <p>25 in that conversation.</p>	<p style="text-align: right;">224</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 And in your answer in this case</p> <p>3 you don't say that at all, correct?</p> <p>4 A. The answer to the first part is</p> <p>5 I'm sure I have said that I had 10 to 15</p> <p>6 conversations a year with Mr. Madoff about</p> <p>7 the strategy.</p> <p>8 And I didn't catch the second</p> <p>9 part.</p> <p>10 Q. In your answer in this case you</p> <p>11 no longer contend that you had 10 to 15</p> <p>12 conversations a year specifically about</p> <p>13 what Ascot was doing in the market?</p> <p>14 A. I'm missing something. What</p> <p>15 gives you that impression? Nothing I</p> <p>16 said, I don't think.</p> <p>17 Q. My reading of the answer. And I</p> <p>18 assume you reviewed it before it was</p> <p>19 filed?</p> <p>20 A. You have to point me in the</p> <p>21 direction of something. If you ask me the</p> <p>22 question de novo, did I think I had 10 to</p> <p>23 15 conversations with Mr. Madoff a year</p> <p>24 about the strategy, I would say I did.</p> <p>25 Q. Did you record all of your</p>
<p style="text-align: right;">223</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Am I right that you have not</p> <p>3 produced any handwritten notes of that</p> <p>4 conversation with Mr. Madoff in which you</p> <p>5 discuss the MARHedge article?</p> <p>6 A. I don't remember. But I don't</p> <p>7 think you're right. I think there's a</p> <p>8 note that refers to our discussion of the</p> <p>9 article. I think there is. And I could</p> <p>10 be wrong.</p> <p>11 Q. Take a look.</p> <p>12 A. I'm not affirming it.</p> <p>13 Q. We'll take a look.</p> <p>14 And, sir, just to get off the</p> <p>15 topic for one second, you agree you</p> <p>16 produced two transcripts of tape-recorded</p> <p>17 conversations that you had with</p> <p>18 Mr. Madoff?</p> <p>19 A. Yes.</p> <p>20 Q. All right. And just so I'm</p> <p>21 clear, sir, at an earlier time in another</p> <p>22 case we had you put an answer in which you</p> <p>23 said you had 10 to 15 conversations per</p> <p>24 year with Mr. Madoff about Ascot's</p> <p>25 strategy.</p>	<p style="text-align: right;">225</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 conversations with Mr. Madoff over the</p> <p>3 years?</p> <p>4 A. No.</p> <p>5 Q. How did you decide when to</p> <p>6 record your conversations with him and</p> <p>7 when not to?</p> <p>8 A. A little bit exactly like Amy.</p> <p>9 When things got way too fast in</p> <p>10 a conversation and he talked almost as</p> <p>11 fast as you and I do and I realized that I</p> <p>12 couldn't take notes or make some small</p> <p>13 notes along the way, I would push a</p> <p>14 certain button on my telephone record it</p> <p>15 and sit back and listen for content,</p> <p>16 rather than to try to catch it at the same</p> <p>17 time.</p> <p>18 And I told him that.</p> <p>19 Q. Well, only two transcripts have</p> <p>20 been delivered. Were other tapes made and</p> <p>21 retained?</p> <p>22 A. There may have been another tape</p> <p>23 made and retained. I'm not sure.</p> <p>24 Q. Wouldn't your discussion with</p> <p>25 him about the truth of the MARHedge story</p>

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<p style="text-align: right;">226</p> <p>1 Merkin - Direct/Bamberger 2 or the insinuations of the MARHedge story, 3 wouldn't that have been an important 4 conversation with him to tape? 5 A. Certainly not if I was having it 6 with him in person. And I think I 7 testified that I went to see him. 8 Q. Okay. We'll look at your 9 handwritten notes in a second. 10 But you certainly would be 11 deeply interested in knowing in what 12 market Mr. Madoff was actually purchasing 13 the puts for the Ascot account, correct? 14 No doubt about that? 15 A. I would be interested in knowing 16 whether we were doing a mix, and that 17 would have come up in conversation. 18 Q. It did come up in a series of 19 conversations, and at no time did he tell 20 you that he was using less than 20 to 25 21 percent CBOE options, correct? 22 A. That's about right. I don't 23 remember a conversation in which the 24 figure shrunk to less than 20 percent of 25 listed options.</p>	<p style="text-align: right;">228</p> <p>1 Merkin - Direct/Bamberger 2 three reasons: 3 I didn't have a Bloomberg 4 terminal. I didn't read Investor's Digest 5 Daily. And the whole concept of, say, 6 50/50, 75/25, 25/75, is not a snapshot 7 concept. 8 Meaning, on any given day, any 9 given turn, it always has to be that way. 10 It's not vertical, it's horizontal, it's 11 over a period of time and over a period of 12 turns and years. 13 Q. But to silence the critics and 14 to perform a test to see whether 15 Mr. Madoff's transactions were real, 16 that's one thing you certainly could have 17 done? You could have paid for a Bloomberg 18 terminal and looked closely at options, 19 where they're being purchased and how much 20 is being bought for your account, correct? 21 That would be a simple check you 22 could perform without having to bother 23 Mr. Madoff, right? 24 A. None of the skeptics that came 25 to me talked about where the options</p>
<p style="text-align: right;">227</p> <p>1 Merkin - Direct/Bamberger 2 Q. And, therefore, it would have 3 been an easy thing for you, at any time 4 during that period when he told you that, 5 just to look at your Bloomberg terminal or 6 look at Investor's Business Daily, and see 7 if there were enough transactions over the 8 CBOE to cover 20 percent of the positions 9 that you just understood had been 10 purchased for the Ascot account standing 11 alone; true? 12 A. Entirely untrue. 13 Q. You could not have just gotten 14 the volume for a given contract that was 15 delivered into your account by -- you're 16 interrupting me this time -- you could not 17 have gotten onto your Barrons terminal and 18 just looked to see on that particular day 19 and occasion the contract that Mr. Madoff 20 represented had been delivered to your 21 account in fact traded on the CBOE and 22 whether there was sufficient volume on 23 that contract on that day to cover what 24 Ascot bought? 25 A. Could not have done that for</p>	<p style="text-align: right;">229</p> <p>1 Merkin - Direct/Bamberger 2 volume of the business was getting done. 3 Q. Correct to say that your 4 staff -- I showed you and that you knew -- 5 that irrespective of how many put options 6 Mr. Madoff allegedly bought for the Ascot 7 account, the price for those options was 8 almost always between the low and the high 9 for that contract on the CBOE on the day 10 in question? 11 A. I'm just not sure what you mean 12 by the staff -- I didn't catch the first 13 part of the question. Can you explain 14 that to me? 15 Do you want me to have it read 16 back? 17 Q. What is the PMS system? Could 18 you briefly tell the Panel? 19 A. The PMS system? 20 Q. Yes. 21 A. Is a system that our office used 22 in which our Madoff portfolio was 23 basically contained in a daily reporting 24 sheet. 25 Q. You got those reports on a daily</p>

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<p>1 Merkin - Direct/Bamberger 2 basis? Meaning, the next day, right? 3 A. No. I got those reports after 4 the close of business -- after the close 5 of trading -- pardon me -- at the end of 6 the day. Let's just pick Tuesday, because 7 today is Tuesday. I would get a Tuesday 8 report sometime between 4:10 and 4:45, 9 I'll leave myself room and say 5:00, but 10 pretty soon after trading was over, with 11 the day's report and the day's P&L. 12 Q. Based on the confirms that your 13 office had received from Mr. Madoff, 14 correct? 15 A. Based on the positions that were 16 shown on that sheet of paper. 17 Q. The sheet of paper was based on 18 the confirms that came in from Mr. Madoff, 19 correct? 20 A. Yes. 21 Q. So you didn't actually see in 22 real-time or on a next-day basis what the 23 Ascot account was buying or selling; you 24 learned that after the paper confirms came 25 into your office, correct?</p>	<p>1 Merkin - Direct/Bamberger 2 high/low for the contract on the day in 3 question, correct? 4 A. I'm not sure that that 5 information was on the -- I just don't 6 remember. 7 You're asking me to compare 8 something to something. Right? 9 Q. Yeah. 10 A. So what are you asking me to 11 compare? 12 Q. I think the point's obvious, and 13 I think I'll move on. 14 When a confirm comes in you see 15 a price for a trade, correct? 16 A. No. I just told you, when the 17 confirms come in, I don't see the price. 18 Q. But somebody does, right? 19 A. Somebody puts it into the PMS 20 system. 21 Q. Somebody, if they were 22 concerned, could easily have gone back and 23 seen whether the price reported on that 24 confirm was in the high/low for that 25 contract on the day of the alleged trade,</p>
231	233
<p>1 Merkin - Direct/Bamberger 2 A. I not only didn't learn it until 3 the paper confirms came into the office, I 4 wouldn't have seen them until those were 5 shown up in our daily report. 6 Q. When the paper confirms -- 7 A. The office took those confirms. 8 I didn't see the confirms -- I wouldn't 9 say never, but quite rarely. And then 10 they showed up on the report, which might 11 have had -- basically, one or two or 12 three, or maybe three or four, modes. 13 Either we're not in, in which case there's 14 an odd piece of a Treasury that comes in, 15 or maybe there's some income interest; 16 we're in, in which case there really is a 17 remarking potentially of every position we 18 own; or there are trades that add or there 19 are trades that drop. 20 So it's adds, drops and the P&L. 21 Q. Right. When those confirms came 22 in, you received the PMS report, you could 23 have easily checked to see whether the 24 price at which the options transactions 25 were said to have been done was in the</p>	<p>1 Merkin - Direct/Bamberger 2 correct? Somebody could have done that? 3 A. I thought you asked me about me. 4 Are you now asking me about somebody else? 5 The person receiving that ticket 6 could have done that, yes. 7 Q. As far as you know they did do 8 that, right? They performed checks to see 9 whether the price as reported by 10 Mr. Madoff was within the high/low of 11 CBOE? 12 A. I don't know. 13 Q. There's no reason, when you're 14 trading over-the-counter, let's say with a 15 counterparty in Europe, and the 16 transaction is 100 times the size of the 17 total volume of that same contract on the 18 CBOE in the U.S., there's no reason that 19 that price would always be within the 20 high/low range for the few contracts that 21 are sold over the CBOE in U.S., right? No 22 natural reason? 23 A. Why not? 24 Q. Well, the market's open hours 25 earlier.</p>

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<p style="text-align: right;">234</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. I can think of several reasons.</p> <p>3 Q. The market opens hours earlier.</p> <p>4 Just before the market in the U.S. opens,</p> <p>5 people bicker about price, they agree on a</p> <p>6 price, that's the price that gets</p> <p>7 confirmed, and that has nothing to do with</p> <p>8 what happens hours later in Chicago,</p> <p>9 correct?</p> <p>10 A. No. I guess -- if that's what</p> <p>11 you meant, I would say not only could I</p> <p>12 think of several reasons why it should, I</p> <p>13 would, broadly speaking, disagree with</p> <p>14 you.</p> <p>15 I think there's every reason to</p> <p>16 think it has something to do with what's</p> <p>17 happening in the American markets.</p> <p>18 Q. Correct to say that the CUSIP</p> <p>19 number on the confirms that your</p> <p>20 organization received for the options</p> <p>21 transactions was always the CBOE CUSIP for</p> <p>22 the OEX 100; true?</p> <p>23 A. The CUSIP number for the listed</p> <p>24 options we received?</p> <p>25 Q. Well, good question.</p>	<p style="text-align: right;">236</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 market."</p> <p>3 Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. From May 2001. This was, I</p> <p>6 guess -- what? Six months or less before</p> <p>7 9/11?</p> <p>8 A. I didn't catch you -- I got the</p> <p>9 quote. After that I didn't hear what you</p> <p>10 said. I'm sorry.</p> <p>11 Q. What I said: After May of 2001</p> <p>12 we experienced just that, a protracted</p> <p>13 bear market in the U.S.?</p> <p>14 A. No.</p> <p>15 Q. We didn't?</p> <p>16 A. I don't think this is what this</p> <p>17 gets at. What this gets at would be --</p> <p>18 either side of the word "or" in that</p> <p>19 paragraph is no volatility.</p> <p>20 He needs volatility to get his</p> <p>21 program to work. He needs volatility to</p> <p>22 catch the turn. So a flat dull market has</p> <p>23 no volatility, and a protracted bear</p> <p>24 market, which is straight down, won't help</p> <p>25 much. You need to be able to catch turns</p>
<p style="text-align: right;">235</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 You only received one confirm</p> <p>3 for a transaction, correct? For an</p> <p>4 options transaction?</p> <p>5 A. I don't know about all the time.</p> <p>6 Q. Well, your records speak for</p> <p>7 themselves.</p> <p>8 But there was never any division</p> <p>9 within a given trade between a CBOE trade</p> <p>10 and an over-the-counter trade; you know</p> <p>11 that, right?</p> <p>12 A. If you're asking me what the</p> <p>13 confirmations looked like?</p> <p>14 Q. Yes.</p> <p>15 A. I would not have seen the</p> <p>16 confirmations. I would have looked at our</p> <p>17 system.</p> <p>18 Q. On page 17 of the article --</p> <p>19 well, page 17 of MARHedge, 4925 -- on the</p> <p>20 bottom, the right-hand side --</p> <p>21 A. Yes, sir.</p> <p>22 Q. -- it says: "'The worst market</p> <p>23 to operate in using the strategy,' he</p> <p>24 adds -- that would be Madoff -- "'would be</p> <p>25 a protracted bear market or a flat dull</p>	<p style="text-align: right;">237</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 within a bear market.</p> <p>3 Q. Because not only was the</p> <p>4 strategy participating in arbitrage, it</p> <p>5 was always going to revert to the mean.</p> <p>6 If the market went down a little bit on</p> <p>7 Monday, it was sure to go up on Friday,</p> <p>8 right? Because markets always revert to</p> <p>9 the mean?</p> <p>10 A. I have no idea what you're</p> <p>11 asking me.</p> <p>12 Q. All right.</p> <p>13 A. You have to define --</p> <p>14 Q. I'll withdraw it if I'm not</p> <p>15 clear.</p> <p>16 Both these articles speak of</p> <p>17 Madoff's business being up to \$6 or \$7</p> <p>18 billion during this period.</p> <p>19 Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. I will represent that both</p> <p>22 articles use that figure --</p> <p>23 A. No.</p> <p>24 Q. Was that consistent with your</p> <p>25 understanding of the size of the accounts</p>

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<p style="text-align: right;">238</p> <p>1 Merkin - Direct/Bamberger 2 managed -- 3 A. When? This is 2000 -- 4 Q. It's May of 2001, sir. 5 A. I can't quite work it out. 6 We were, at the end, something 7 like 3½ or 4 percent of its capital. And 8 I want to see if that works with what we 9 were then. I just can't remember. 10 When I say "at the end," at the 11 end of the end, when the bomb went off in 12 December of '08, given what we were, and 13 given what was reported under management 14 we were about 4 percent of that figure. 15 Q. Correct to say that when you 16 read this, that he did not deny that he 17 was managing 6 to \$7 billion, that was not 18 a surprise to you, that it had grown that 19 large? 20 A. I don't remember that being a 21 surprise. 22 Q. That he would be among the three 23 largest hedge funds in the world, had he 24 been a hedge fund; that would not be a 25 surprise to you?</p>	<p style="text-align: right;">240</p> <p>1 Merkin - Direct/Bamberger 2 both by Roman, who you referred to 3 earlier, and by a Paul Olin, who signed as 4 head of structural risk of UBP Alternative 5 Investments. 6 Do you see that? 7 A. I don't, but I'm sure it's here. 8 Q. Now, there did come a time when 9 UBP called upon you to arrange a meeting 10 at the lipstick building with Bernie 11 Madoff, correct? 12 A. That's not quite the way it came 13 about. Such a meeting did come about. I 14 offered it to them. 15 Q. And they took you up on it? 16 A. Yes. 17 Q. Did Mr. Olin, the risk manager, 18 did he actually attend that meeting? 19 A. I believe so. There were four, 20 five people there from UBP. I'm not sure 21 exactly who was whom. 22 Mr. Igolnikov was there. 23 Q. This is about two months before 24 Mr. Madoff is arrested, correct? 25 A. Yeah -- it's in the fourth</p>
<p style="text-align: right;">239</p> <p>1 Merkin - Direct/Bamberger 2 A. I'm not so sure that would make 3 him one of the three largest at that time. 4 Q. Can you turn to 63, please. 5 (The witness complies.) 6 MR. BAMBERGER: I apologize, 61 7 and 62 is in evidence, Mr. Levander. 8 MR. LEVANDER: I've objected to 9 neither. 10 MR. BAMBERGER: So 61 and 62 are 11 in evidence. 12 (Claimant's Exhibit 62, received 13 in evidence.) 14 BY MR. BAMBERGER: 15 Q. Now, sir, what I tried to do in 16 63 is try to put in a single place all the 17 handwritten notes that I can find that 18 were in your diligence file. 19 And if you remember, in the 20 prior go-around with the arbitration your 21 counsel had pointed out one that I had 22 missed, and I'll represent to you that 23 I've included it in here this time. 24 I've also included in here a 25 letter that seems to have been co-signed</p>	<p style="text-align: right;">241</p> <p>1 Merkin - Direct/Bamberger 2 quarter. 3 Q. Now, is it correct to say that 4 Mr. Madoff shared with you from time to 5 time that he was facing massive 6 redemptions, especially in the second half 7 of calendar year 2008? 8 A. No. 9 Q. Did the subject ever arise 10 between you and him? 11 A. "The subject" being...? 12 Q. The level of redemptions that he 13 was seeing. 14 A. Once, that I can remember. 15 Q. When? 16 A. He and I began to have a 17 conversation in the fourth quarter of '08, 18 when I began to give him a sense of what 19 our year-end redemptions might be. 20 Q. Right. 21 A. And I asked him, you know, how 22 are you handling redemptions. 23 Meaning, are they under control. 24 Q. Right. 25 A. And he said yes.</p>

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<p style="text-align: right;">242</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. UBP Asset Management was one of</p> <p>3 the parties that served a redemption</p> <p>4 notice on you, correct?</p> <p>5 A. They served a redemption notice,</p> <p>6 which in significant part they retracted.</p> <p>7 Q. What was the redemption</p> <p>8 amount -- the initial --</p> <p>9 A. I don't remember. It was not a</p> <p>10 small redemption.</p> <p>11 Q. It was over 200 million, was it</p> <p>12 not?</p> <p>13 A. I just don't remember. It was</p> <p>14 certainly over 100 million. It was in the</p> <p>15 100 millions. I just don't remember.</p> <p>16 Q. Correct to say that by far UBP</p> <p>17 was the largest single investor in Ascot?</p> <p>18 A. It was the largest single</p> <p>19 investor in Ascot.</p> <p>20 Q. Correct to say that UBP knew</p> <p>21 fully that this was a Madoff strategy,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. In the first paragraph of UBP's</p> <p>25 letter --</p>	<p style="text-align: right;">244</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 MR. LEVANDER: What does that</p> <p>3 mean?</p> <p>4 MR. BAMBERGER: It means that I</p> <p>5 paginated these documents in that way.</p> <p>6 And I may have used 2.1. And between</p> <p>7 2 and 3 it appears I did.</p> <p>8 BY MR. BAMBERGER:</p> <p>9 Q. That's just for identification,</p> <p>10 so you and I can talk efficiently about</p> <p>11 the documents. They are not part of the</p> <p>12 evidence.</p> <p>13 The letter from UBP speaks of</p> <p>14 Madoff as an execution manager.</p> <p>15 Do you see that?</p> <p>16 A. This is the letter of October</p> <p>17 10, 2008, right?</p> <p>18 Q. Yes.</p> <p>19 (The witness reads document.)</p> <p>20 A. Yes.</p> <p>21 Q. Okay. And he is asking various</p> <p>22 diligence questions, correct?</p> <p>23 A. He's asking diligence questions</p> <p>24 to Ascot, about Ascot, and about Madoff.</p> <p>25 Q. And one speaks specifically of</p>
<p style="text-align: right;">243</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. Can you just point me to the</p> <p>3 letter, if you want me to look at it or</p> <p>4 focus on it --</p> <p>5 Q. Sure. 5382.</p> <p>6 A. And this is in tab 63, right?</p> <p>7 Q. It is.</p> <p>8 A. 5382.</p> <p>9 These numbers are out of</p> <p>10 sequence, right?</p> <p>11 Q. Yes.</p> <p>12 A. Okay.</p> <p>13 Q. In this case I have put a page</p> <p>14 number in handwriting in the lower</p> <p>15 right-hand column, 1 through 18, just for</p> <p>16 easy reference to this exhibit. They are</p> <p>17 not part of the evidence.</p> <p>18 Do you understand that?</p> <p>19 A. Yes, I do.</p> <p>20 Q. Okay. So to be clearer, I'm</p> <p>21 just referring to my handwritten page 10.</p> <p>22 MR. LEVANDER: Mr. Bamberger,</p> <p>23 I'm not quite sure. You've got a 2.1,</p> <p>24 a 2-1 --</p> <p>25 MR. BAMBERGER: Same deal.</p>	<p style="text-align: right;">245</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 segregation of duties. Do you see that,</p> <p>3 sir?</p> <p>4 A. No, but I'm sure it's here -- is</p> <p>5 that in the numbered paragraph?</p> <p>6 Q. Paragraph 1.</p> <p>7 (The witness reads document.)</p> <p>8 A. Yes.</p> <p>9 Q. The investor, Mr. Madoff, gets</p> <p>10 an F for segregation of duties; is that a</p> <p>11 fair summary?</p> <p>12 He just fails that particular</p> <p>13 category; true?</p> <p>14 A. I don't know what you're asking.</p> <p>15 I don't understand the question.</p> <p>16 MR. BAMBERGER: Okay, I withdraw</p> <p>17 it.</p> <p>18 A. Okay.</p> <p>19 Q. Do you see in paragraph 9 -- by</p> <p>20 the way, did you ever make a determination</p> <p>21 about whether this was principally written</p> <p>22 by Mr. Olin or Mr. Igolnikov?</p> <p>23 A. The letter?</p> <p>24 Q. Yes.</p> <p>25 A. No.</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 Q. This is more the kind of letter</p> <p>3 that a head of structural risk might</p> <p>4 write, rather than the chief information</p> <p>5 officer?</p> <p>6 A. It is not chief information</p> <p>7 office. It's the chief investment</p> <p>8 officer.</p> <p>9 Q. I apologize, sir, of course.</p> <p>10 I'm sorry. I'm tired.</p> <p>11 A. I don't know why it would be</p> <p>12 more one than the other.</p> <p>13 Q. Really?</p> <p>14 A. Yes.</p> <p>15 Q. Well, you had never received a</p> <p>16 letter like this from UBP before, had you?</p> <p>17 A. I don't know a letter. We</p> <p>18 certainly had conversations with UBP over</p> <p>19 the years, and lots of questions.</p> <p>20 These sort of came a little more</p> <p>21 formally put together, mostly because they</p> <p>22 wanted written answers rather than only</p> <p>23 telephone answers.</p> <p>24 Q. It's a fact, is it not, that you</p> <p>25 had an e-mail with Roman, and asked Roman</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 Sir, in this exhibit will you</p> <p>3 agree, maybe from the last time, that</p> <p>4 there are a number of notes that say, in</p> <p>5 words or substance, telephone conversation</p> <p>6 with Bernard L. Madoff, and then rather</p> <p>7 than having a date it will have just a</p> <p>8 month and a year?</p> <p>9 A. There are such notes, yes.</p> <p>10 Q. Correct to say the sum and</p> <p>11 substance of your testimony last time is</p> <p>12 that these really were reconstructions</p> <p>13 years after the fact of conversations and</p> <p>14 calls that you would have had, or to the</p> <p>15 best of your memory you did have, with</p> <p>16 Madoff years earlier; true?</p> <p>17 MR. LEVANDER: Blatantly false.</p> <p>18 There's no such testimony as that. I</p> <p>19 object.</p> <p>20 THE CHAIRMAN: Whoa, whoa, whoa.</p> <p>21 Are you answering the question?</p> <p>22 MR. LEVANDER: This is --</p> <p>23 THE CHAIRMAN: If you object say</p> <p>24 "I object" and then the legal basis of</p> <p>25 the objection. Not answering for the</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 whether Paul Olin was an adversary or an</p> <p>3 ally?</p> <p>4 Do you recall that e-mail?</p> <p>5 A. I don't know, but it's true I</p> <p>6 had many, many, many more conversations</p> <p>7 with Roman than I did with Paul.</p> <p>8 Q. In number 9 Paul says that, in</p> <p>9 effect, UBP understands how we make money</p> <p>10 if the market goes up, but please</p> <p>11 illustrate how we make money using the</p> <p>12 strategy when the market goes down.</p> <p>13 Do you see that?</p> <p>14 A. What numbered paragraph are you</p> <p>15 up to?</p> <p>16 Q. Nine.</p> <p>17 A. Okay.</p> <p>18 Q. You try to answer that question,</p> <p>19 correct?</p> <p>20 A. Yes. I think the long-form</p> <p>21 answers in the one perhaps that you</p> <p>22 withdrew a couple of pages behind it were</p> <p>23 correlating to the numbers of the</p> <p>24 paragraphs.</p> <p>25 Q. Good.</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 witness, please.</p> <p>3 MR. LEVANDER: Okay.</p> <p>4 MR. BAMBERGER: Maybe I should</p> <p>5 withdraw my question.</p> <p>6 THE CHAIRMAN: All right,</p> <p>7 rephrase it.</p> <p>8 MR. BAMBERGER: Since only one</p> <p>9 of you sat in the prior matter.</p> <p>10 MR. LEVANDER: Can I just state</p> <p>11 my objection?</p> <p>12 MR. BAMBERGER: I withdrew my</p> <p>13 objection.</p> <p>14 THE CHAIRMAN: The question is</p> <p>15 withdrawn.</p> <p>16 MR. BAMBERGER: Mr. Chairman,</p> <p>17 with your permission I'm going to use</p> <p>18 my pagination of the document.</p> <p>19 BY MR. BAMBERGER:</p> <p>20 Q. Looking at page 1, sir?</p> <p>21 A. We're at tab -- same tab? This</p> <p>22 is going to be, bottom right-hand, 1?</p> <p>23 That's the very first page?</p> <p>24 Q. 1 is usually the first page.</p> <p>25 A. I didn't realize that was a 1.</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Your an honors graduate of</p> <p>3 Harvard Law School, right?</p> <p>4 A. If you say that's page 1, then</p> <p>5 it's page 1.</p> <p>6 THE CHAIRMAN: Let's not be</p> <p>7 facetious.</p> <p>8 MR. BAMBERGER: I'm actually</p> <p>9 not.</p> <p>10 THE CHAIRMAN: It looks like a</p> <p>11 line on the bottom. He said, oh,</p> <p>12 that's a 1.</p> <p>13 Cool it all down, please.</p> <p>14 BY MR. BAMBERGER:</p> <p>15 Q. Although, sir, it's a fact;</p> <p>16 either you did graduate Harvard Law School</p> <p>17 cum laude or you didn't, right?</p> <p>18 You just have to review your</p> <p>19 diploma --</p> <p>20 A. I don't know about the diploma,</p> <p>21 but it's a fact that you either did or</p> <p>22 didn't.</p> <p>23 Q. And you didn't --</p> <p>24 A. I did not.</p> <p>25 Q. -- graduate cum laude?</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 corner, this was a note of a conversation</p> <p>3 that you had with Mr. Madoff?</p> <p>4 A. Yes.</p> <p>5 Q. You had it on May 23 of 1995?</p> <p>6 A. That's what this says.</p> <p>7 Q. Any reason to believe it was any</p> <p>8 other day?</p> <p>9 A. No.</p> <p>10 Q. Do you recall why you took this</p> <p>11 note?</p> <p>12 A. Let me read the note for a</p> <p>13 moment.</p> <p>14 (The witness reads document.)</p> <p>15 A. Yes, it has a fair amount of</p> <p>16 interesting information.</p> <p>17 Q. Okay, thank you.</p> <p>18 Page 2. Only because for time</p> <p>19 management reasons, sir -- I'm not trying</p> <p>20 to cut you off -- I want to stick with</p> <p>21 most important.</p> <p>22 That document also has a full</p> <p>23 date of September 30, 1999, correct?</p> <p>24 A. Yes, it does.</p> <p>25 Q. Any question that you, in fact,</p>
251	253
<p>1 Merkin - Direct/Bamberger</p> <p>2 A. You mumbled.</p> <p>3 Q. You didn't graduate cum laude.</p> <p>4 But you told people in a succession of</p> <p>5 biographies that you graduated Harvard Law</p> <p>6 School with honors?</p> <p>7 A. I had a paragraph at one point</p> <p>8 that had a bio made that referred to an</p> <p>9 honors that I got in Harvard Law School.</p> <p>10 It did not say I was a cum laude</p> <p>11 graduate.</p> <p>12 Q. Right. "Cum laude" means with</p> <p>13 honors?</p> <p>14 THE CHAIRMAN: "With praise."</p> <p>15 A. I think "with praise," is the</p> <p>16 Latin...</p> <p>17 THE CHAIRMAN: "With praise." I</p> <p>18 was a classics major. Sorry.</p> <p>19 MR. BAMBERGER: No problem, sir.</p> <p>20 You don't need to --</p> <p>21 A. For what it's worth.</p> <p>22 Q. That was a little puffing on</p> <p>23 your part, was it not, sir?</p> <p>24 A. I didn't think so.</p> <p>25 Q. On page 1, the lower right-hand</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 made that note on September 30, 1999?</p> <p>3 A. No.</p> <p>4 Q. The next document, for example,</p> <p>5 says telephone call? "Tele call with BL</p> <p>6 Madoff." But it doesn't have a date. It</p> <p>7 just says "June 2001."</p> <p>8 Do you see that?</p> <p>9 A. It has a date of June 2001.</p> <p>10 Q. By "date" I mean the actual day</p> <p>11 that the conversation occurred.</p> <p>12 A. Okay. It says "June 2001."</p> <p>13 Q. But in general, sir, is it not</p> <p>14 your habit that, when you're having a</p> <p>15 telephone conversation with a person, and</p> <p>16 you're making a note of it, that you write</p> <p>17 down the exact day on which the</p> <p>18 conversation occurred?</p> <p>19 A. Yes. Unless there was more than</p> <p>20 one conversation in that month, or we were</p> <p>21 discussing events that took place in that</p> <p>22 month, perhaps a little bit later or</p> <p>23 perhaps a little bit earlier.</p> <p>24 So this may be a continuation of</p> <p>25 a conversation we had had perhaps in late</p>

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<p style="text-align: right;">254</p> <p>1 Merkin - Direct/Bamberger 2 May, perhaps in June. It may have even 3 applied to what we were doing in early 4 July. 5 Q. Isn't it possible, sir, that you 6 made this note in very late 2008 or in 7 2009, after the arrest of Madoff? 8 A. No. 9 Q. You're sure it's not a 10 recreation of something that happened 11 years earlier? 12 A. I'm absolutely certain. 13 Q. When did you actually put pen to 14 paper and draft the note that became 2.1? 15 A. I think I answered that. It 16 would have been very near June 2001, 17 referring to events that took place 18 perhaps slightly earlier or perhaps 19 slightly later. 20 But I would say that at the very 21 latest, you know, July of that -- the 22 following month, at the latest. 23 Q. Okay. 24 So it wasn't made 25 contemporaneously with the phone call?</p>	<p style="text-align: right;">256</p> <p>1 Merkin - Direct/Bamberger 2 reasonably right. I'm not sure I 3 personally would execute. 4 But I don't think that the 5 conception was that nobody else, in either 6 my organization or the Madoff 7 organization, would have nothing to do 8 with the strategy or its execution. 9 Q. Could you turn to page 3? 10 (The witness complies.) 11 Q. Now, here I do see -- 12 A. I'm sorry. 13 Q. Did you make the note of page 3 14 on February 20 of 2003? 15 A. I believe so. 16 Q. It says: "In 2002, one or two, 17 May, July, big tidal waves successfully 18 surfed." 19 Did I read that right? 20 A. Yes. 21 Q. Surfing waves, that's not part 22 of an arbitrage strategy, is it, sir? 23 A. It's certainly part of the 24 notion that we were trying to catch a 25 turn.</p>
<p style="text-align: right;">255</p> <p>1 Merkin - Direct/Bamberger 2 A. This note? 3 Q. Yes. 4 A. I don't remember. 5 You asked me what is the latest 6 it could possibly have been. With a phone 7 call it's entirely possible that Madoff 8 was going so fast that I wrote down, very 9 fast, some notes, and then turned it into 10 this. 11 And that is, I wasn't writing as 12 we spoke on the phone, which is what I 13 take you to mean by "contemporaneous." 14 Q. Now, in December of 2002, a year 15 and a half later, you did, in fact, inform 16 the Board of Trustees at Yeshiva 17 University, in connection with your 18 raising the fee on Ascot by 50 percent 19 effective January 1, 2003, that you needed 20 to charge the increased fee to cover \$20 21 million of new hardware and software 22 costs, to cover the cost of a possible 23 LEAPS strategy that you personally would 24 execute, correct? 25 A. Everything, I think, sounds</p>	<p style="text-align: right;">257</p> <p>1 Merkin - Direct/Bamberger 2 If you look at the next sentence 3 and read the two together, or perhaps read 4 the three sentences together, you'll 5 understand what this was trying to convey, 6 which was that in the prior year, in a 7 sentence, we were likely to have in '03, 8 as compared to '02 -- '02 having a smaller 9 number of larger turns, there would be one 10 or two or perhaps more, but really large 11 opportunities -- whereas, in '03, it was 12 going to be more in and out, there were 13 going to be a larger number of turns, and 14 we were going to make less per turn. 15 Q. And catching that wave meant 16 being in the market when it was about to 17 go up, correct? 18 A. That's what the phrase "catching 19 the turn" means? 20 Q. Yes. Catching a wave? 21 A. Oh, catching a wave? 22 Q. "This year we'll have to catch a 23 larger number of smaller waves." 24 A. Right. A larger number of 25 smaller turns. That's the same concept.</p>

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<p>1 Merkin - Direct/Bamberger 2 Q. "Turns" meaning it could go up 3 or it could go down, either's fine? 4 A. No. "Turns" meaning -- you 5 certainly weren't guaranteed 6 profitability. But you were going to try 7 to come in, catch a turn in the market 8 that you were successfully set up for, 9 either achieve the profitability you 10 wanted or not make money or lose. 11 But it was going to be -- we 12 were going to be in the market for a 13 shorter period of time and have more ins 14 and outs than the previous year. 15 The previous year we might have 16 been out of the market for months and 17 months and months because the turns were 18 smaller in number and just steeper. 19 Q. Could you turn to page 4, 20 please. 21 (The witness complies.) 22 A. Page 4, yes. 23 Q. Correct to say that this page 24 and page 2.1 were made on the same day? 25 A. Let me just go back to page 2.1.</p>	<p>1 Merkin - Direct/Bamberger 2 A. I'm sure it wasn't a 3 transcription. It was probably a summary. 4 Q. But you never talked to him 5 before a particular trade about where 6 the -- what the strike price would be of 7 the put, or the strike price of the calls, 8 or whether to invest the entire account or 9 80 percent at that moment? You never had 10 such conversations with Mr. Madoff, 11 correct? 12 A. No. That's not correct. 13 Q. That's not correct... 14 By why are you writing a note of 15 a telephone call with Mr. Madoff and 16 saying that this -- meaning the 17 formalization of the bands in writing -- 18 has been the subject of several basic 19 conversations, returns to it again and 20 again? 21 I mean, why are you narrating 22 something in a call with Bernie Madoff? 23 A. I guess I don't understand your 24 question. 25 If that's the conversation we've</p>
259	261
<p>1 Merkin - Direct/Bamberger 2 I would say that that is 3 unlikely -- not unlikely. That's wrong. 4 Q. Well, which is it? Was it 5 unlikely, which was your first answer, or 6 wrong? 7 A. Wrong. 8 Q. Well, I notice that they both 9 say a "Tele call with BL Madoff." You 10 used that expression both times. 11 Do you see that? 12 A. Just one moment. 13 Yes. My guess is the words "BL 14 Madoff," Bernard Madoff, and a date, 15 appear on virtually all of these. 16 Q. And is this note on page 4, is 17 that a writing down of what you talked 18 about in a call with Mr. Madoff in June of 19 2005? 20 A. Let me just take a look and read 21 this. 22 (The witness reads document.) 23 A. What was the question? 24 Q. Is this a transcription of what 25 you talked about with Mr. Madoff that day?</p>	<p>1 Merkin - Direct/Bamberger 2 had and I was trying to summarize it, why 3 would that not be something I would do? 4 Q. But it may have been in haste, 5 you may have been very upset. 6 The bands were formalized in 7 November of 2002, or thereabouts, correct? 8 A. Are you referring to the trading 9 directive? 10 Q. Yes. 11 A. They're certainly formalized 12 there, but the trading directive does 13 nothing but put into writing what had 14 previously been the case, with some small 15 changes. 16 It's not a novel -- it doesn't 17 transform the relationship or the nature 18 of the money management enterprise. 19 Q. Can you turn to page 5, please. 20 (The witness complies.) 21 A. As it suggests, it says -- you 22 know -- has formed the basis. 23 Page 5. 24 Q. This doesn't contain a month or 25 a year. I put it there, not knowing where</p>

66 (Pages 258 to 261)

262	264
<p>1 Merkin - Direct/Bamberger 2 to put it. 3 Did I put it in the right place? 4 (The witness reviews document.) 5 A. Well, it's not dated, so I 6 don't -- and you put it somewhere between 7 June of 2005 and November of 2006. 8 Q. I did. 9 A. Okay. I don't know. 10 Q. Do you have any explanation as 11 to why it's not dated? 12 A. Haste, forgetfulness. I don't 13 remember. 14 Q. Did you ever agree with him 15 during that period about how much risk 16 could be taken, how much the stocks would 17 fall before the puts kicked in? 18 A. Yes. Surely so. That is the 19 principal theme, to me, of the trading 20 directive, and the principal theme of the 21 entire relationship, and many, many, many 22 conversations: What is the risk that 23 we're taking. How much can we lose. 24 Q. "Bernie repeated that he would 25 check each time he is ready to come in on</p>	<p>1 Merkin - Direct/Bamberger 2 A. I'm sorry -- I didn't catch the 3 question. 4 Q. Are you able to say at all when 5 you made the note? 6 A. It's very possible you guessed 7 right in where you put it. I don't know. 8 It would seem to me to be -- in 9 many ways -- timeless. This is what the 10 relationship was about. It was a 11 matter -- 12 Q. I think you hit it right on the 13 head, sir. It's timeless. 14 A. It was a question of risk and 15 reward. And whether this came before the 16 trading directive or after the trading 17 directive, the strategy was that was the 18 strategy. 19 Q. Looking at page 6, please -- 20 THE CHAIRMAN: It's a little 21 after 3 and the court reporter has 22 asked for a short break. 23 MR. BAMBERGER: That's fine. 24 THE CHAIRMAN: Unless you're 25 going to finish with the witness in</p>
263	265
<p>1 Merkin - Direct/Bamberger 2 the absolute loss tolerated and its 3 relation to the gain possibly achieved on 4 a percentage basis." 5 Did you mean -- or did Bernie 6 say that he would check with you? Is that 7 what you were saying there? 8 A. Yes. 9 Q. Well, he certainly didn't do 10 that, did he, sir? 11 A. The fact that I wrote it down 12 suggests that he didn't do it every time. 13 But it would be very typical and 14 very usual for us to have a conversation 15 if we were out. Meaning in Treasuries. 16 For him to say, this looks like -- you 17 know, the constellation of the market 18 looks auspicious for us and we're 19 considering coming in, we're looking for 20 an entry level. 21 And then we would have a 22 discussion of how much we could be risking 23 in order to make how much. 24 Q. Are you able to say at all when 25 you made this note, sir?</p>	<p>1 Merkin - Direct/Bamberger 2 another five minutes. 3 MR. BAMBERGER: The witness? 4 Not a chance. But the document, yes, 5 sir. 6 THE WITNESS: Are we taking a 7 break? 8 THE CHAIRMAN: Yes, sir. 9 (A recess was taken.) 10 MR. BAMBERGER: Mr. Chairman, 11 should I continue? 12 THE CHAIRMAN: Please. 13 BY MR. BAMBERGER: 14 Q. Mr. Merkin, returning your 15 attention to page 6 of Tab 63. 16 This certainly isn't a verbatim 17 note of a telephone call you had with BL 18 Madoff, correct? 19 A. It certainly isn't. 20 Q. You wouldn't know if it was a 21 long telephone call until it was over, 22 correct? 23 A. At some point, if it's long 24 enough, you know halfway through. 25 Q. Right. But, again, this is not</p>

67 (Pages 262 to 265)

266	268
<p>1 Merkin - Direct/Bamberger 2 the actual writing down of a note while 3 you're talking on the telephone to Bernie 4 Madoff, correct? This was prepared after 5 that call? 6 A. I should read it. But my guess 7 is I'm going to tell you it's a summary 8 and not a transcript. 9 Q. Any explanation for why there's 10 not a full date, why it just says November 11 2006? 12 (The witness reads document.) 13 A. Well, I think as I previously 14 suggested, when it was a month and a year 15 was the date, it referred to the period of 16 time, including possibly a little bit of 17 time before it, a little bit of time after 18 it. 19 And perhaps more than one phone 20 call in that period of time. 21 Q. Do you know when Roger Madoff 22 died? 23 A. Roger Madoff died in the spring, 24 I believe, of 2006. 25 Q. Correct. Now, if you're having</p>	<p>1 Merkin - Direct/Bamberger 2 order to calculate the P&L we needed to 3 compare the purchase price with the last 4 sale of that security. 5 Q. Why were you reviewing those 6 sheets with Mr. Madoff? 7 A. I don't know the specific reason 8 then, but surely to check something 9 regarding either the correct number of 10 options, or what the -- how big the risk 11 was that we were looking at on the sheets. 12 Q. Why does choppiness help 13 returns? 14 A. Are you quoting something from 15 this? It says choppiness helps return -- 16 there it is. 17 Choppiness is no different than 18 market volatility, essentially. This is 19 the same thing you asked me about the 20 MARHedge article. If you have a perfectly 21 calm, flat sea, the strategy needs 22 volatility to make money. 23 Q. Because the market will always 24 ratchet back? A few days after the market 25 goes up, it always goes down again? A few</p>
267	269
<p>1 Merkin - Direct/Bamberger 2 10 to 15 calls a year with Mr. Madoff, the 3 subject of Roger's death wouldn't 4 obviously come out six months later, I'm 5 asking, or could it? 6 A. He talked about it obsessively. 7 Q. Mr. Madoff did? Mr. Bernie 8 Madoff did? 9 A. Correct. 10 Q. When you said, "pulled out 11 sheets, reviewed with him," could you give 12 us a little more color on that? What does 13 that mean? 14 A. Well, the "pulled out sheets" 15 was me. 16 Q. All right. What was he looking 17 at? 18 A. I'm not sure he was looking -- I 19 don't know what he was looking at, since 20 this was on the telephone. 21 But I was -- it's got to be that 22 I was looking at that day's set of sheets. 23 Q. Those sheets wouldn't have given 24 you the purchase price, correct? 25 A. Those sheets were a P&L. In</p>	<p>1 Merkin - Direct/Bamberger 2 days after it goes down it will always go 3 up again? That's what choppiness is? 4 A. No. I'm not saying that markets 5 go down, don't go back up. 6 You need an entry level. You 7 need to be able to get in, catch a turn, 8 and get out. 9 Q. That's not possible, sir; no one 10 can do that? 11 A. There's similar -- they are 12 different expressions for the same basic 13 phenomenon. 14 Q. Sir, can you turn to page 7 of 15 your notes. 16 (The witness complies.) 17 Q. And this is a note of both a 18 visit and a follow-up telephone call? 19 A. Let me just take a look at this. 20 (The witness reads document.) 21 A. I'm having a tough time reading 22 it, because the paper's so thin. Can you 23 just give me a second? 24 (The witness reads document.) 25 A. That's correct.</p>

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<p>1 Merkin - Direct/Bamberger 2 Q. All right. So this is 13 months 3 or so before Mr. Madoff is arrested? 4 A. Yes. 5 Q. We don't have a date for the 6 visit or the telephone call? 7 A. Well, you do. We have a date of 8 November 2007. As I previously testified, 9 either very shortly before or perhaps 10 shortly thereafter, but in that immediate 11 period of time there is both a visit and a 12 telephone call. 13 My guess is -- it says 14 "follow-up" -- I had questions about it, 15 or was thinking about the visit, and I put 16 it into one note and dated it November of 17 2007. 18 Q. Where was the visit? 19 A. In his office. 20 Q. Would that entry be reflected in 21 your monthly calendar for November of 22 2007? 23 A. Might be. I don't know. 24 Q. Most of the note, though, the 25 last two-thirds of it, deals with the</p>	<p>1 Merkin - Direct/Bamberger 2 Q. Yes? 3 A. "Discuss names, total number (16 4 to 20 and percentage)." Okay? 5 Q. Uh-hum. 6 A. Hyphen, "moving well above half. 7 Not my percentage. And percentage." 8 Q. All right, thank you. 9 That means in the markets where 10 he's purchasing the puts, now more than 50 11 percent are being purchased in general 12 OTC; is that right? 13 A. Well above half. 14 Q. "Posting of margin and structure 15 percentage allocation of contra-parties to 16 each managed account across the entire 17 book of customer business, also 18 discussed." 19 A. Uh-hum. 20 Q. "This means that every managed 21 account shares pro rata in all the names. 22 They are not selected and assigned, say, 23 five (of the 16 to 20) to each account." 24 So in other words, all the 25 managed accounts are going to take the</p>
271	273
<p>1 Merkin - Direct/Bamberger 2 question of where the puts are being 3 bought and sold, correct? 4 A. There's some important 5 information prior to that, which is the 6 stocks expand in number up past 50 out of 7 100 OEX's. That's an important fact. 8 Q. That hadn't occurred in 2004, 9 early 2005? 10 A. I don't remember. I think it 11 goes up, comes back down and then it goes 12 back up again. 13 Q. It says: "Increasing puts 14 achieved through use of OTC puts, 15 discuss" -- discuss manner -- excuse me -- 16 "discussed names, total number, 16 to 20, 17 my percentage moving well above half." 18 Now, the reference there to 19 "total number," that's the total number of 20 his OTC counterparties for the puts? 21 A. Can I just correct one or two 22 things -- one thing that you read wrong? 23 Q. Absolutely. 24 A. Going back to the thing that 25 starts, "Discuss," with a capital D.</p>	<p>1 Merkin - Direct/Bamberger 2 risk of any particular counterparty who 3 may fail, they're all going to participate 4 pro rata, right? 5 A. You have a diversified, and 6 equally diversified. 7 Let's say the number really was 8 20, and not 16 to 20. You're not going to 9 get a quarter of those names, you're going 10 to get all of them. Every managed account 11 got every name. 12 Q. And the counterparty in those 13 cases would be Ascot -- Ascot Partners LP, 14 correct? 15 They would be the party that 16 would enter into the transaction; 17 Mr. Madoff would have authority to enter 18 into such a transaction on Ascot Partners' 19 behalf, correct? 20 A. I believe the way you asked the 21 question the answer is no. No, the 22 counterparty is the 16 to 20 names. 23 Q. Who is that party dealing with? 24 A. That party, Ascot Partners -- if 25 it's Ascot Partners LP -- had a managed</p>

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<p style="text-align: right;">274</p> <p>1 Merkin - Direct/Bamberger 2 account at Madoff that gave him the 3 authority to do this. 4 Q. So Madoff would be entering into 5 confirms and master agreements, in your 6 understanding, on behalf of Ascot? 7 A. Correct. 8 Q. You would have to enter into 9 those ISDA agreements and confirms with 10 the thousands of parties whose accounts he 11 managed, correct? 12 A. I don't know. But that -- I 13 don't know what he was doing with 14 thousands of accounts. He would have to 15 be doing that for this strategy 16 (indicating). 17 Q. Every one of those people would 18 have to have their own confirm, have to be 19 redelivered, et cetera? 20 A. Well, no. That's what a pooled 21 vehicle is. You get one. 22 Q. You got one, but I understand 23 you to be saying that Madoff would get, 24 for Ascot, one confirm from each of the 16 25 to 20 counterparties, and he would get one</p>	<p style="text-align: right;">276</p> <p>1 Merkin - Direct/Bamberger 2 A. I looked at actual confirms 3 very, very rarely. 4 Q. And did you instruct Mr. Autera 5 or anyone else in your organization to 6 look at those confirms as a result of this 7 new information? 8 A. I don't remember any such 9 conversation. 10 Q. Well, by now the market should 11 becoming a higher level of anxiety, 12 generally, in the market? 13 If we look at the VIX, for 14 example, this should be a lot higher by 15 November of 2007 than it was before the 16 mortgage-backed Bear Stearns funds 17 collapsed, correct? More nervousness now? 18 A. The Bear Stearns funds collapse, 19 in your head, is when? 20 Q. Well, I thought it was -- it was 21 announced that Bear Stearns wasn't going 22 to support them in the summer of '07, and 23 they collapsed a couple of months later. 24 A. I just can't place them within 25 the sequence. That is why I'm asking the</p>
<p style="text-align: right;">275</p> <p>1 Merkin - Direct/Bamberger 2 confirm for every one of his managed 3 accounts for each of his counterparties, 4 if the business is conducted that way? 5 A. With a big "if," yes. For those 6 businesses that he conducted that way, the 7 answer would be yes. 8 Q. Why did this subject arise in 9 November of 2007? 10 A. I'm not sure I remember any 11 specific reason. Fourth quarter was 12 generally the time for, you know, a 13 conversation, where are we, where are we 14 going, are there changes in the strategy, 15 is there changes in the market, is the 16 strategy less efficient, is there 17 competition, are you tweaking it, should 18 there be a change in the directive. I 19 don't know. That's when we discussed 20 these things. 21 Q. As a result of this note did you 22 do any fresh due diligence, looking at 23 your confirms and comparing those confirms 24 to actually reported transactions on the 25 CBOE?</p>	<p style="text-align: right;">277</p> <p>1 Merkin - Direct/Bamberger 2 question. 3 You're talking about the 4 collapse of the Bear Stearns funds and not 5 the collapse of Bear Stearns? 6 Q. Oh, sure, right. 7 A. I just want to make sure I 8 understood. 9 I can't fit that into November 10 of 2007. 11 Q. Bear Stearns didn't collapse. 12 It was taken over by merger. Correct? 13 A. But a stock that goes from 100 14 to 2, I guess you could call that a 15 collapse. 16 Q. When did you make the note on 17 page 7? 18 A. Page 7 -- you've asked me this. 19 So this was a note that referred to both a 20 visit and a telephone call that took place 21 in November 2007, or slightly before, or 22 slightly later. 23 And, therefore, I would have 24 made this note either in the middle, the 25 end of November, or maybe very early</p>

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<p style="text-align: right;">278</p> <p>1 Merkin - Direct/Bamberger 2 December. 3 Q. Okay. Now, turning your 4 attention to page 8, and this is a note 5 that you and I have discussed more 6 extensively before, correct? 7 A. Today? 8 Q. No. The Weidenhorn case. 9 A. I don't remember. We 10 discussed -- 11 Q. Maybe I'm wrong. 12 A. But if you ask me a question to 13 it that reminds me of a discussion I'll be 14 happy to tell you yes. 15 Q. When did you make the note on 16 page 8? 17 A. Either slightly before April 18 or -- when did I make the note? Probably 19 toward the middle of April. It might have 20 been a little bit later. I don't remember 21 exactly when. 22 Q. How could you have made the note 23 before April 2008, when it's talking about 24 whether we're in the market or not? 25 A. I didn't say I did.</p>	<p style="text-align: right;">280</p> <p>1 Merkin - Direct/Bamberger 2 November, it may have been made in early 3 December. 4 The analog and parallel folds 5 perfectly between page 7 and page 8. 6 Q. I appreciate that you're a 7 highly trained lawyer, but I would like 8 you to do your best to answer my 9 questions, if you can, if you don't 10 remember our conversations about this in 11 the prior case. 12 MR. LEVANDER: Move to strike. 13 MR. BAMBERGER: Granted. 14 BY MR. BAMBERGER: 15 Q. Do you recall that records 16 produced by the accountants show that 17 Ascot was in the market -- in other 18 words, owned stocks, owned puts, and sold 19 calls -- each and every trading day in 20 April of 2008, including April 1 of 2008? 21 A. I remember that -- this is what 22 you referred to, our prior conversation? 23 Q. Yes. 24 A. This is important. You asked me 25 if I remember this going back to April</p>
<p style="text-align: right;">279</p> <p>1 Merkin - Direct/Bamberger 2 Q. Is it necessarily the case that 3 you made this note on or after April 1, 4 2008? 5 A. It's highly likely that I did. 6 Almost surely I made it after April 1st. 7 I might have made it on April 1st. But I 8 didn't make it in March. 9 Q. I misunderstood an answer you 10 gave. 11 You certainly didn't make it in 12 March? 13 A. Right. That doesn't mean it 14 didn't necessarily refer to events in 15 March. 16 I say again, when there's months 17 without days, they refer to events that 18 may have taken place before or nearly 19 after that month, and were generally made 20 in that period of time. 21 If you go back to page 7, there 22 was both a phone call and a visit. It was 23 November of 2007. It may have referred to 24 things that took place before November, it 25 may have been made toward the end of</p>	<p style="text-align: right;">281</p> <p>1 Merkin - Direct/Bamberger 2 2008, or going back to our prior 3 conversation? 4 Q. What I pointed out to you in the 5 prior matter is that the statement, "we're 6 out of the market," you confirmed meant 7 that you were jotting down your 8 understanding was that Mr. Madoff at some 9 point was telling you that Ascot did not 10 own stocks and puts, but was in 11 Treasuries? That's what "we're out of the 12 market" means, correct? 13 A. Yes. I would have known that -- 14 Q. If I'm wrong you'll tell me, but 15 I thought we confirmed the last time at no 16 time in April of 2008 was that correct; 17 you were always in the market, in fact 18 owning stocks, in Ascot? 19 A. That may very well be the case. 20 I thought you were asking me now if I 21 remember that; that that is my memory 22 today of what I remembered in April of 23 2008. 24 It is very possibly my memory of 25 what we discussed at a period of time well</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 subsequent to April 2008. But I think</p> <p>3 that that is what is reflected in some of</p> <p>4 the things you've shown me the last time</p> <p>5 we discussed this particular note.</p> <p>6 Q. Forgetting about the last</p> <p>7 hearing, your considered testimony under</p> <p>8 oath is your best recollection would be</p> <p>9 that you made this note either in --</p> <p>10 sometime in April 2008 or shortly</p> <p>11 thereafter, correct?</p> <p>12 A. Describing events that took</p> <p>13 place in April 2008 or earlier. Correct.</p> <p>14 Q. It says here: "The Treasuries</p> <p>15 have been purchased in the names of the</p> <p>16 investors and are held in the deposit at</p> <p>17 the Treasury." Correct?</p> <p>18 A. Yes.</p> <p>19 Q. So that means that these</p> <p>20 Treasuries couldn't possibly be on an</p> <p>21 account statement issued by Bernard</p> <p>22 L. Madoff Investment Securities, LLC,</p> <p>23 correct?</p> <p>24 A. I don't know why not.</p> <p>25 Q. Well, because if they're held at</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 A. Do you mean August or do you</p> <p>3 mean a different month?</p> <p>4 Q. If I said August, I meant April.</p> <p>5 A. In April I think we were in. At</p> <p>6 the end of April I think we were in. If</p> <p>7 we were in and we were fully in, there</p> <p>8 would be no Treasuries.</p> <p>9 Q. Okay.</p> <p>10 A. I think that is exactly what you</p> <p>11 asked me to reconfirm from our last</p> <p>12 discussion.</p> <p>13 Q. You said here that there was a</p> <p>14 time, whether it was in March or April,</p> <p>15 that Treasuries had been purchased in the</p> <p>16 names of investors that are being held at</p> <p>17 the U.S. Treasury, correct? Whether it</p> <p>18 was in March or April. That was your</p> <p>19 understanding?</p> <p>20 A. Yes. That's what this says.</p> <p>21 Q. So you could have easily</p> <p>22 looked at your statements issued by</p> <p>23 Bernard L. Madoff Investment Securities</p> <p>24 for either March or April and seen that</p> <p>25 what Mr. Madoff had just told you was a</p>
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<p>1 Merkin - Direct/Bamberger</p> <p>2 the Treasury, that's where they're held,</p> <p>3 and you can't very well say -- a person</p> <p>4 such as Bernard Madoff can't put out an</p> <p>5 account statement saying the securities</p> <p>6 are in his custody when they're not. That</p> <p>7 would be fraud.</p> <p>8 A. I would consider that sentence,</p> <p>9 if I were you, and wonder the irony of it.</p> <p>10 You're telling me that Bernard</p> <p>11 Madoff wouldn't put out a statement that</p> <p>12 wasn't fraudulent.</p> <p>13 Q. I'm asking you something much</p> <p>14 more prosaic.</p> <p>15 Couldn't you have looked at your</p> <p>16 account statements for the month-ended</p> <p>17 August of 2008, delivered to you by</p> <p>18 Bernard L. Madoff, seeing that the account</p> <p>19 statements say the Treasuries were held at</p> <p>20 Bernard L. Madoff, compared to the</p> <p>21 information that you were told at the time</p> <p>22 that they are all being held in the</p> <p>23 Treasury, and immediately throw up your</p> <p>24 hands and become extremely, extremely</p> <p>25 concerned?</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 lie; true?</p> <p>3 A. I don't think so. No.</p> <p>4 Q. But if they are held in</p> <p>5 Treasury, they can't be held in your</p> <p>6 Madoff account; they can't be in two</p> <p>7 different places at once?</p> <p>8 A. The question, did Ascot own</p> <p>9 those Treasuries.</p> <p>10 Q. No, that's not my question, sir.</p> <p>11 A. I didn't say that was your</p> <p>12 question. That was my answer.</p> <p>13 Q. My question was more broadly:</p> <p>14 What diligence did you do to the</p> <p>15 truth of the statement that Mr. Madoff had</p> <p>16 just made?</p> <p>17 A. Well, certainly by the time this</p> <p>18 note is done, we're back in.</p> <p>19 Q. Okay. And that's not my</p> <p>20 question.</p> <p>21 A. So I don't remember, as I sit</p> <p>22 here today, that I did or didn't do any</p> <p>23 particular diligence.</p> <p>24 So the answer to your question</p> <p>25 is I don't remember.</p>

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<p style="text-align: right;">286</p> <p>1 Merkin - Direct/Bamberger 2 Q. "No contra-party risk. Can't be 3 borrowed, can't be margined." 4 That's because the securities 5 are over at the Treasury, right? 6 A. No. It could also mean that 7 they're simply not in an account that lets 8 the Treasuries be what is called 9 hypothecated in the place of Treasuries. 10 It basically says that nobody 11 could have borrowed these and failed to 12 return them because they filed for 13 bankruptcy. 14 Q. They weren't being counted in 15 anybody's capital, they couldn't be lent, 16 they couldn't be margined against, they 17 couldn't be the subject of security, et 18 cetera. They are all in Treasury. You, 19 Mr. Merkin, don't need to worry, thank 20 God, it's a terrible market. 21 And then you do nothing to see 22 if that statement is true or not? 23 A. The first part of that speech is 24 wrong. They were our Treasuries -- 25 THE CHAIRMAN: Fellows, please,</p>	<p style="text-align: right;">288</p> <p>1 Merkin - Direct/Bamberger 2 one's hard? 3 A. I would guess 22. 4 Q. Okay. Any particular reason why 5 this note does get a date? 6 A. Does or doesn't? 7 Q. Does get a full date. 8 A. I would have to read the note. 9 (The witness reads document.) 10 A. Yes. Probably. 11 Q. Did you place the call or did 12 he? 13 A. I don't remember. It's entirely 14 possible that I placed the call and he 15 called me back, or he placed the call and 16 I called him back. 17 Q. Did you record the call? 18 A. Did I report it? 19 Q. Record the call. 20 A. I don't think so. 21 Q. Did you record the call of 22 March/April 2008? 23 A. The prior page? 24 Q. Yes. 25 A. Page 8?</p>
<p style="text-align: right;">287</p> <p>1 Merkin - Direct/Bamberger 2 one at a time. Finish the question, 3 finish the answer. The other one 4 shouldn't break in. 5 A. Okay. Who's speaking? You are? 6 Go right ahead. 7 Q. Sir, at some point in or around 8 March or April of 2008 you were told that 9 securities to which you had title were 10 being held, not at Bernard L. Madoff but 11 at the Treasury, and you never 12 investigated that -- investigated whether 13 that was true or not, correct? 14 A. I don't remember. By the time 15 we had the discussion we were in. 16 Q. Would you turn to page 9, 17 please. 18 (The witness complies.) 19 Q. This note does appear to have a 20 complete date. Do you see that? 21 A. Yes, I do. 22 Q. Is that June 22 of 2008 or...? 23 A. Now you're asking a hard 24 question. 25 Q. The other one wasn't hard? This</p>	<p style="text-align: right;">289</p> <p>1 Merkin - Direct/Bamberger 2 I don't think so. 3 Q. Well, in this increasingly 4 uncertain time wouldn't it have been a 5 good idea to tape-record the conversations 6 with Mr. Madoff about what he's telling 7 you? 8 A. I don't think so. 9 Q. Well, during this time, in 2008, 10 he was once again reporting gains each and 11 every quarter. Maybe there was one month 12 that he was down one-tenth of a percent. 13 But while the market is down 20, 25 14 percent, he's basically breaking even at 15 this time. That's what he's reporting to 16 you, right? 17 A. That's consistent with the 18 second paragraph on page 9, because what 19 this note tells you is we've been out of 20 the market since late May. Okay? And 21 we're not coming back in until July. 22 Which is probably why the note 23 has a date. Because it doesn't really 24 discuss events in July, because he's 25 telling you that he's not looking for an</p>

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<p>1 Merkin - Direct/Bamberger 2 entry level -- an entry point until July. 3 And one of the specific features 4 of the account in 2008 is we spent a fair 5 amount of time on the sidelines. Spend 6 time on the sidelines, you can break even. 7 Q. Although the record reflects 8 that he claims to have gotten in on April 9 1 of 2008, when the market was up 2.2 10 percent, the day after Lehman announced 11 that it had fresh buyers for 3 or \$4 12 billion of preferred and might live to see 13 another day, right? He just happened to 14 get in that day? 15 A. That sounds right. 16 This is something else. This 17 says we're out since the second half of 18 May and we're going to spend all of June 19 on the sidelines, into July. 20 Q. Why did the subject of FOCUS 21 Reports arise? 22 A. Don't remember. 23 Q. Did he raise it or did you? 24 A. I don't remember. It -- I -- I 25 would be totally guessing from the last</p>	<p>1 Merkin - Direct/Bamberger 2 questions? 3 A. My recollection or my pretty 4 good guess is that I think I went to see 5 Bernie. The 12 and 13 are very fast notes 6 I took while I was there. And there are 7 more just notes to myself. 8 They're expanded into what you 9 have as 14, 15 and 16. Okay? 10 Q. All right. 11 A. Then there was a conference 12 call, which is 17, and then there's a 13 visit, which is 18. 14 Q. Right. We're not quite there 15 yet. 16 A. Right. I understand that. 17 Q. This was an actual physical 18 meeting at 885? 19 A. Which is "this" now? 12? 20 Q. 12, 13 and 14, 15, 16 are just 21 you and Mr. Madoff? 22 A. 12 and 13 for sure. 23 14, 15 and 16 is just the 24 more -- is the longer and more literal and 25 fuller version of 12 and 13.</p>
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<p>1 Merkin - Direct/Bamberger 2 sentence in that paragraph that maybe the 3 SEC was in to visit him on a surprise 4 basis at that time. I'm just totally 5 guessing. Maybe that's why it came up. 6 But that's entirely speculative. 7 Q. Okay. Now, turning to your 8 notes of pages 12/13. 9 A. Just one moment. Okay. 10 Q. This was your first stab to 11 answer the diligence you got from UBP 12 Asset Management. The numbers correspond 13 to the questions? 14 A. Just one moment. 15 (The witness reviews document.) 16 A. You're on 12 now? 17 Q. 12/13, yes. 18 A. So there are ten numbered 19 questions in 10 and 11, right? 20 Q. Yep. 21 A. And these numbers on 12 and I 22 guess 13 -- it's one note with two 23 sides -- refer to those paragraphs. 24 Q. Pages 14, 15, 16 are your 25 expanded answers to the same first nine</p>	<p>1 Merkin - Direct/Bamberger 2 Q. Okay. 3 A. I don't think it was an 4 additional visit. There may have been a 5 phone call in between, I don't remember. 6 But they both reference the 10-paragraph 7 letter. 8 And then there's a long phone 9 call with UBP people and people from my 10 office on the basis of 14, 15 and 16. 11 And then there's a visit with 12 the full UBP team and Mike and me at 885 13 Third Avenue, which is what you see on 18. 14 Q. And turning your attention to 15 13, please? 16 A. 13. Not 12/13, just the last 17 part of it? 18 Q. Yep. 19 A. Okay. 20 Q. And this is an answer to the 21 question of where are the options traded 22 by Madoff, whether they're Exchange-listed 23 or traded over-the-counter? 24 A. You asked me about paragraph 8? 25 Q. Yep.</p>

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<p style="text-align: right;">294</p> <p>1 Merkin - Direct/Bamberger 2 A. I'm just going to go back and 3 read the question. 4 (The witness reads document.) 5 A. Okay. So that's paragraph 8 on 6 page 11. 7 Q. They want to know about the 8 credit exposure. 9 And is this information that 10 Mr. Madoff is giving you? 11 A. Yes. 12 Q. So it says "Exchange-listed and 13 OTC firm trades"? In other words, his 14 firm trades both? 15 A. No, I don't think so. 16 Exchange-listed and OTC. 17 Q. Next line? 18 A. Period. Firm trades OTC when 19 there is no OCC -- okay, let me just -- 20 Q. I don't want you to do that. 21 A. Okay. 22 Q. "Firm trades OTC when no OCC." 23 A. No, that's not what that says. 24 Q. What does it say? When... 25 "Firm trades OTC."</p>	<p style="text-align: right;">296</p> <p>1 Merkin - Direct/Bamberger 2 that none of this is a transcript. 3 Q. I'm asking you about 8. 4 A. The only words that I would 5 suggest were words that he said verbatim 6 are the two words that are in quotes. 7 That's why they're in quotes. 8 Q. Well, you wouldn't write "20 9 percent of the underlying index still 10 prefers OCC" unless he told you that, 11 right? You're not going to come up with 12 that by telepathy? 13 A. You're just mangling what it 14 says here. Let me try to answer your 15 question. 16 "Performance assurances, 20 17 percent of the underlying index" -- that 18 has to do with the nature of the 19 performance assurance and how much it is. 20 It has nothing -- it's not nothing. 21 Period. 22 So let me try this again. 23 "Exchange-listed and OTC." 24 Period. "Firm trades OCC." Period. 25 "When no OCC" -- no Options Clearing</p>
<p style="text-align: right;">295</p> <p>1 Merkin - Direct/Bamberger 2 A. Period. 3 Q. "When no OCC" -- 4 A. Comma. 5 Q. -- "require performance 6 assurances" -- in quotation marks -- "20 7 percent of the underlying index still 8 prefer OCC." 9 Do I have that correct? 10 A. The easiest way to understand -- 11 Q. I'm sorry, sir -- 12 A. I'm not sure you do. I would 13 suggest that you look at paragraph 8, the 14 fuller version of it that was done, on the 15 next page. 16 Q. We'll get there, sir. 17 A. Okay. 18 Q. Don't you worry about that. 19 But my question is: Were these 20 words that Bernie Madoff was saying to 21 you? 22 And in this case were you trying 23 to take down verbatim exactly what he told 24 you? 25 A. I think I previously testified</p>	<p style="text-align: right;">297</p> <p>1 Merkin - Direct/Bamberger 2 Corporation, which is what you get with an 3 OTC trade -- "require performance 4 assurances, 20 percent on the underlying 5 index." Period. "Still prefer OTC." 6 Okay, it's a different thought. 7 It's related it's paragraph 8, but it's a 8 different thought. 9 We did this the last time, 10 because you pointed out the Hebrew. 11 Q. Does that say "still prefer 12 OTC," or "OCC"? And you better be 13 careful. 14 A. The short answer is -- 15 Q. Yeah, the short answer. 16 A. -- OCC. 17 Q. You just said OTC. 18 And that paren is a "firm 19 invented the OEX"? Is that what it says? 20 A. Yes. 21 Q. And that reference to "firm" 22 meant Bernard L. Madoff Securities? 23 A. Yes. 24 Q. There's no basis for saying 25 that, right? His firm didn't invent the</p>

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<p style="text-align: right;">298</p> <p>1 Merkin - Direct/Bamberger 2 OEX index? 3 A. Is there no basis for saying 4 that? 5 Q. Yes. 6 A. That's what he said. He said 7 that the firm played a very significant 8 role in the creation of index options, 9 including the OEX and its parallel on the 10 S&P 500. That was something that had 11 kicked around in the industry amount. 12 Q. That was Hebrew for "worth 13 noting"? 14 A. If I may josh you slightly, you 15 did better the last time. 16 It's Ra-ui le-Tsiun. It means 17 "noteworthy." It has nothing to do with 18 Zion. 19 Q. I'm just asking. 20 Contra -- what's the rest of it? 21 A. Just one second. 22 (The witness reads document.) 23 Q. Is it "Outside of OCC a 24 counterparty could fail"? 25 A. That's very likely right. If</p>	<p style="text-align: right;">300</p> <p>1 Merkin - Direct/Bamberger 2 vertical, and perhaps I said it in too 3 short form of manner. 4 It refers to an overall 5 relationship that abided over a 6 significant period of turns and 7 expirations. Not that day, not that 8 snapshot. 9 Q. And, sir, it would be easy to 10 have looked at an entire quarter or year's 11 worth of prior results to see whether this 12 was in general true, that he was still 13 buying at least 20 percent of options on 14 the CBOE, correct? You could have easily 15 done that? 16 A. I don't know. 17 THE CHAIRMAN: You don't know 18 whether you could have checked on 19 this? 20 THE WITNESS: It would not have 21 been difficult to check. It would 22 depend on the period of time. 23 In other words, the further you 24 get away from a daily concept the more 25 work you have to do to get it right.</p>
<p style="text-align: right;">299</p> <p>1 Merkin - Direct/Bamberger 2 you permit me to turn to page 15, it might 3 shed some light on it. 4 Q. Okay. And you told the Attorney 5 General in your deposition in 2009 that 6 when -- in one of your last conversations 7 with Madoff he was telling you that he 8 still was purchasing 20 to 25 percent of 9 the puts on the CBOE? In other words, 10 buying OCC-eligible options. 11 That's what you testified to, 12 correct? 13 A. It certainly could be. I just 14 don't remember the specific testimony. 15 Q. And you could have easily 16 checked out if that was true at the time, 17 right? 18 A. Hmmm, not so sure. 19 I previously testified, again, 20 the 20 percent is not a snapshot. It's 21 not, okay, at any one day and every single 22 day it's 80/20. It's over a period of 23 time. 24 That's what I meant earlier when 25 I was referring to a horizontal and not a</p>	<p style="text-align: right;">301</p> <p>1 Merkin - Direct/Bamberger 2 It should not, in principle, be that 3 difficult. 4 BY MR. BAMBERGER: 5 Q. Sir, when he said "when no OCC," 6 that must have struck you as incredibly 7 odd; is that right? 8 Because why would he be able to 9 buy options in monstrous quantities 10 over-the-counter that were of interest to 11 him, and be unable to trade and buy those 12 same options over-the-counter? 13 A. I just didn't follow the 14 question, I'm sorry. 15 Q. And I may have misspoken. 16 The CBOE is the much more 17 efficient market for the purchase and sale 18 of options and over-the-counter, correct? 19 Price discovery, et cetera, 20 standard confirmations, OCC guarantee. 21 Way easier and way cheaper to trade on the 22 CBOE than it is over-the-counter; true? 23 A. Well, depends what your 24 objective is. 25 The principal advantage of</p>

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<p style="text-align: right;">302</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 having the OCC in the picture was the</p> <p>3 significant reduction of the</p> <p>4 over-the-counter -- of the contra-party</p> <p>5 risk.</p> <p>6 After that there's many reasons</p> <p>7 not to trade on a listed basis, including</p> <p>8 you can shape things the way you want</p> <p>9 them, including a much longer trading day,</p> <p>10 including a little bit less bound or</p> <p>11 tethered to the American markets, and</p> <p>12 including discretion, and including size,</p> <p>13 and including volume.</p> <p>14 If you're a retail investor and</p> <p>15 small, some of the things we're saying</p> <p>16 matter more.</p> <p>17 Q. Sir, on the bottom of 14 --</p> <p>18 A. Bottom of 14?</p> <p>19 Q. Yes.</p> <p>20 -- in answer to question 3 --</p> <p>21 you say this both on 12 and 14 in answer</p> <p>22 question 3 -- that your accounts at Madoff</p> <p>23 are cash accounts, not margin, and that's</p> <p>24 certainly clear on the face of the</p> <p>25 statement.</p>	<p style="text-align: right;">304</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. That is Lauren. I can't</p> <p>3 remember her last name. She is an</p> <p>4 in-house compliance person at UBP, and I</p> <p>5 have her face in front of me, and her card</p> <p>6 in front of me. She was at the meeting.</p> <p>7 And I can't remember her last</p> <p>8 name.</p> <p>9 Q. Okay. And there was an actual</p> <p>10 meeting with Bernie Madoff and the UBP</p> <p>11 people two or three weeks before he was</p> <p>12 arrested, on November 25, '08, correct?</p> <p>13 That's page 18?</p> <p>14 A. Yes.</p> <p>15 Q. All right.</p> <p>16 A. The phone call that you've asked</p> <p>17 about on 17 precedes that, just to be</p> <p>18 clear.</p> <p>19 Q. Okay.</p> <p>20 A. Just to be clear. Appreciate</p> <p>21 that.</p> <p>22 Q. Is it correct to say that at</p> <p>23 this meeting he said that reversion to</p> <p>24 mean was the key to the strategy?</p> <p>25 A. He -- it says "he harps on</p>
<p style="text-align: right;">303</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 And then you say with respect to</p> <p>3 3 on page 14, "when in Treasuries</p> <p>4 segregated at the depository in individual</p> <p>5 customer names."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. You could simply ask for -- look</p> <p>9 at the statement, and if you see them</p> <p>10 being held at Madoff, that makes no sense?</p> <p>11 A. I'm truly not sure that's true.</p> <p>12 I think a little bit depends on</p> <p>13 what the individual -- who the individual</p> <p>14 -- or who or what the individual customer</p> <p>15 was.</p> <p>16 Q. Okay. And your notes on page 17</p> <p>17 and 18 are fully --</p> <p>18 A. I'm sorry, 17 and 18?</p> <p>19 Q. 17 and 18.</p> <p>20 -- are fully dated notes,</p> <p>21 correct?</p> <p>22 A. Just one moment.</p> <p>23 Yes.</p> <p>24 Q. Who is Laurie, at the top of</p> <p>25 page 17? If it is Laurie.</p>	<p style="text-align: right;">305</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 reversion to mean" -- I am sure it was the</p> <p>3 key to the strategy, although that's what</p> <p>4 it says.</p> <p>5 He talked about reversion to</p> <p>6 mean being something he had done -- as a</p> <p>7 factor in the businesses he had run going</p> <p>8 back to his early days in the convertible</p> <p>9 arbitrage business.</p> <p>10 MR. BAMBERGER: I move 63 into</p> <p>11 evidence at this time.</p> <p>12 MR. LEVANDER: No objection.</p> <p>13 (Claimant's Exhibit 63, received</p> <p>14 in evidence.)</p> <p>15 BY MR. BAMBERGER:</p> <p>16 Q. Turning your attention to</p> <p>17 Exhibit 64, please --</p> <p>18 A. Can I take one minute and have a</p> <p>19 drink of water here one second?</p> <p>20 Q. I'm sorry?</p> <p>21 A. Can I have a drink of water here</p> <p>22 for one second?</p> <p>23 Q. Sure.</p> <p>24 A. Tab 64?</p> <p>25 Q. Yes. This was a document that</p>

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<p style="text-align: right;">306</p> <p>1 Merkin - Direct/Bamberger 2 was marked for identification at your 3 deposition by the Attorney General, 4 correct? 5 (The witness reads document.) 6 A. I don't know. What are you 7 referring to? 8 Q. That label in the upper 9 right-hand corner has a date, January 30, 10 2009. 11 I'll just indicate, that's about 12 six weeks after Madoff was arrested and 13 that the Attorney General in fact took 14 your deposition on that day. 15 A. Okay. 16 Q. State of New York. 17 You did in fact attend a meeting 18 of the Law School Finance Committee on 19 November 14, 2006? 20 A. I believe so. 21 Q. And all of those persons were 22 present? 23 A. I don't remember. I'm sure they 24 were all there. 25 Q. All right.</p>	<p style="text-align: right;">308</p> <p>1 Merkin - Direct/Bamberger 2 page of the document, 1217 -- 3 A. Who was the first -- 4 Q. Is it correct to say -- turning 5 your attention to page 1217 -- that you 6 presented Ascot Partners fund or Ascot 7 Partners LP to the group on that occasion? 8 A. Yes. 9 Q. Why was it that you presented 10 Ascot and not Gabriel? 11 A. I think that's what 12 Mr. Sinscheimer asked me to do. 13 Q. Correct to say that you told the 14 meeting on that day that Ascot had never 15 had a calendar quarter -- 16 A. I'm sorry? 17 Q. Correct to say that on that 18 occasion you told those assembled that 19 Ascot had never had a negative calendar 20 quarter? 21 A. It's likely that I said that. 22 Q. Correct to say that you said at 23 the meeting that Ascot's worst year it was 24 up 8.07 percent? 25 A. I don't remember. I could well</p>
<p style="text-align: right;">307</p> <p>1 Merkin - Direct/Bamberger 2 A. I would guess that while I was 3 there not all the guests were there. I 4 think it was me or the other guy. 5 Q. Had you met Ralph Sinscheimer 6 before that meeting? 7 A. I think I have, yes. 8 Q. What was your impression of 9 Mr. Sinscheimer? 10 A. He seemed like a very nice 11 person. A somewhat rare type-B 12 personality in a business that is people 13 with As and triple As. 14 Q. Under what circumstance did you 15 first meet him? 16 A. I just don't remember. I think 17 he took over responsibility for whatever, 18 you know, his shop, Solaris, does for an 19 existing limited partner. 20 Q. Who was that limited partner? 21 A. Well, if I remember correctly 22 that that was the first time, then that 23 would have been someone related I think to 24 the Barry family. 25 Q. Am I correct, on the second full</p>	<p style="text-align: right;">309</p> <p>1 Merkin - Direct/Bamberger 2 imagine I said that. 3 Q. Is it correct to say that you 4 said the annual return was three times 5 annual Treasuries? 6 A. Not sure I said that. I could 7 have said some sort of a benchmark against 8 Treasuries, or tried to explain to some 9 extent what our objectives might be. 10 Actually, that's our annual 11 goal. 12 Q. Correct to say that you told 13 those assembled that the fund did not use 14 any leverage? 15 A. It's correct that it doesn't. I 16 don't remember saying it. I imagine I 17 did. 18 Q. Correct to say that you, 19 Mr. Merkin, tried to exploit short-term 20 pricing discrepancies in the options 21 market? 22 A. I'm sure I didn't say that 23 sentence the way it's written. 24 Q. Correct to say you told those 25 assembled that proprietary computer-driven</p>

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<p style="text-align: right;">310</p> <p>1 Merkin - Direct/Bamberger 2 models guide you and your team to 3 situations that are priced outside the 4 limits of the put/call parody 5 relationship? 6 A. I am now entirely sure that I 7 never used the phrase put/call parody 8 relationship. I'm not sure it means, here 9 or otherwise. And I think it's probably a 10 summary done by whoever authored this 11 report, and, as you'll see, begins to get 12 things rather wrong. 13 Q. Correct to say that you told 14 those at the meeting that each position is 15 hedged, so that there are maximum gains 16 and losses with each scenario but with 17 higher potential on the upside? 18 A. Doubt it. 19 Q. I'm sorry? 20 A. I don't think that's the case, I 21 don't think I said that. I might have 22 talked about a strategy that talked about 23 hedging. But I'm not sure each position 24 is hedged. It's long past the point of 25 individual stocks and individual puts.</p>	<p style="text-align: right;">312</p> <p>1 Merkin - Direct/Bamberger 2 Q. Sir, please? 3 A. -- the exact contrary is what I 4 might have said. 5 Q. Ah. So some things he gets 6 right and some things he gets wrong? 7 A. Most of the things he gets 8 wrong, and most of the things he mangles 9 rather badly. Not just gets wrong. 10 Q. The minutes, you understand, 11 were approved by the entire committee, 12 correct? 13 MR. BAMBERGER: Withdrawn. 14 A. But the next sentence is a good 15 example of something that he gets mangled. 16 Q. Sir, give me a chance. 17 Here's my question, sir: 18 Is it correct to say that you 19 told those at the meeting that about 15 20 percent of Ascot utilizes longer duration 21 options, or LEAPS, which you trade through 22 Bernie Madoff? In words or substance, 23 isn't it correct to say you did tell the 24 meeting that? Right? 25 A. In words or substance, I did not</p>
<p style="text-align: right;">311</p> <p>1 Merkin - Direct/Bamberger 2 So unless somebody said how did 3 this evolve, and maybe I talked about 4 that, and I certainly don't remember that 5 being the case. I certainly don't 6 remember talking about an individual 7 position. 8 Q. But it is possible there could 9 have been some puffing going on at the 10 meeting? After all, America's built on 11 puffing; fair summary? We are all 12 salesmen to a greater or lesser extent, in 13 the end, aren't we? 14 A. I'm not sure what your question 15 is. I'm not sure America is built on 16 puffing. 17 I think I would probably agree 18 with that. It's not something you 19 probably want to go too far down the line 20 with. 21 Q. Is it correct that you said most 22 of the positions used listed options, so 23 for these there is no counterparty risk? 24 A. My guess is that on that 25 sentence and the next one --</p>	<p style="text-align: right;">313</p> <p>1 Merkin - Direct/Bamberger 2 tell the meeting that. I told the meeting 3 something entirely contrary to that. 4 There's four mistakes in that 5 one sentence. 6 We weren't doing LEAPS in any 7 big way. I probably told him we could do 8 as much as 10 or 15 percent of the fund 9 not through Bernie Madoff, the rest 10 through Bernie Madoff. And some examples 11 of what we might do, not through him, 12 might be LEAPS. It would be something we 13 would do not through him if we were going 14 to clear the LEAPS ourselves. 15 But it's precisely not the 15, 16 but the 85, that is mangled and not right. 17 The basic message was that 18 there's a self-clearing risk here, which 19 seems to have been retained in the last 20 sentence. 21 Q. Is it correct to say at the 22 meeting that Ralph pointed out that there 23 was a higher level of risk on the portion 24 of the fund that is traded through 25 Mr. Madoff?</p>

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<p style="text-align: right;">314</p> <p>1 Merkin - Direct/Bamberger 2 A. My assumption is that Ralph 3 wrote this memo, so he recorded himself 4 correctly. 5 Q. And my question to you, sir -- 6 okay. You didn't take any notes at this 7 meeting. You were presenting, correct? 8 A. Correct. 9 Q. Did you present with any written 10 materials at the meeting? 11 A. I just don't remember. 12 Q. The next paragraph -- do you 13 know who David Cornstein is? 14 A. Well, his name appears as a 15 Board committee member of the New York Law 16 School Finance Committee meeting on the 17 top of the minutes of the page, so to that 18 extent I know who he is. 19 Q. Is that the only time you met 20 David Cornstein? 21 A. Could very well be. I don't 22 remember. 23 Q. Did you understand what he did 24 for a living? 25 A. No.</p>	<p style="text-align: right;">316</p> <p>1 Merkin - Direct/Bamberger 2 calls are and what the underlying equity 3 is, right? That's easy to understand, 4 correct? 5 A. You would not be short the 6 underlying equity by being short the 7 calls. You would be long the underlying 8 basket of stocks, long puts and short 9 calls. 10 Q. So it is your testimony that you 11 could not possibly have said or suggested 12 anything remotely like the second sentence 13 of this paragraph, correct? 14 A. I just don't remember -- I'm not 15 saying it's impossible I didn't say 16 anything like it. 17 I can't think of what that might 18 be as I sit here today. I just don't 19 know. I -- I just don't know what the 20 sentence refers to. 21 You're asking me to make sense 22 of it. You're asking me to interpret it. 23 I don't know what it says. 24 Q. I'm actually not trying to do 25 that. I'm asking you if this is largely,</p>
<p style="text-align: right;">315</p> <p>1 Merkin - Direct/Bamberger 2 Q. Did he ask you if Ascot utilizes 3 shorting techniques? "Yes," "no," "I 4 don't recall." 5 A. It looks like he did. I don't 6 remember. 7 Q. Did you tell them that you had 8 several implementation strategies, some of 9 which require shorting the underlying 10 equity if dictated by the prices of the 11 related put/call contracts? 12 A. I don't know what that sentence 13 means. 14 Q. Well, he says you said it. Are 15 you saying you didn't say it? 16 A. If you put quotes around that 17 sentence? 18 Q. In sum or substance, yeah. In 19 sum or substance -- 20 A. My guess is I might have said 21 something about shorting, meaning shorting 22 calls, is an important part of the 23 strategy. So I don't know how that 24 becomes that (indicating). 25 Q. Everybody understands what the</p>	<p style="text-align: right;">317</p> <p>1 Merkin - Direct/Bamberger 2 in your recollection, an accurate 3 reflection of what you did or would have 4 said in this meeting on such an occasion 5 which, after all, wasn't so long ago. 6 A. No. 7 Q. Did you say that the fund can 8 make money in any type of market? And 9 make the comment that's ascribed to you 10 there about the market price of puts and 11 calls? 12 (The witness reads document.) 13 A. I might have said something 14 about the overvaluation of calls in bull 15 markets and puts in bear markets, and that 16 the overvaluation of the puts in bear 17 markets is higher than the overvaluation 18 of calls in bull markets. 19 But unless we have the right 20 positions on, we can't make any money in 21 any market. 22 It's a silly thing to say, it's 23 a silly thing to understand one as having 24 said. 25 You can't have the same</p>

80 (Pages 314 to 317)

<p style="text-align: right;">318</p> <p>1 Merkin - Direct/Bamberger 2 positions and make money in any kind of 3 market. It doesn't make any sense. 4 Q. Well, actually the line is 5 remarkably similar to a statement made in 6 the Spring Mountain Capital note of a year 7 earlier, correct? Remarkably similar 8 sentiment as expressed? 9 A. I don't know what you're 10 referring to. 11 Q. All right. We'll look at it. 12 A. Okay. 13 Q. Did you say hundreds of trades 14 need to be implemented? 15 A. I don't know what this refers 16 to. I might have been referring to the 17 fact that if you hypothesize a certain 18 number of turns a year, and say a 50 -- 50 19 stocks in the basket, and then try to 20 calculate how many trades that becomes in 21 a given year, it would be hundreds and 22 hundreds. It would be something closer to 23 a thousand, than hundreds. 24 Q. Did you say that you only need 25 to be right approximately 22 percent of</p>	<p style="text-align: right;">320</p> <p>1 Merkin - Direct/Bamberger 2 before the meeting or not. If we did then 3 they would know that from the record, not 4 because it was necessarily said at the 5 meeting. 6 Q. Wouldn't it be part of your 7 presentation? Wouldn't you say that Ascot 8 was formed in 1992? 9 A. I don't think I started by 10 saying Ascot was formed in 1992. You 11 generally don't do these things 12 historically. You generally explain what 13 you do. In other words, you start with 14 the present. 15 Q. When you said he said that you 16 say that you applied to the strategies not 17 scalable, did you do that? 18 A. Just one second. I lost my 19 place. 20 So I got past the 22 percent 21 comment, which I don't understand -- where 22 are -- this strategy is not scalable? 23 No. My guess is that -- I don't 24 know what that comes from. The question 25 on banks and competitors I think goes</p>
<p style="text-align: right;">319</p> <p>1 Merkin - Direct/Bamberger 2 the trades in order to break even? 3 A. I thought you referred to that 4 earlier in the day. That's something that 5 I just can't imagine what I said that's 6 gotten mangled into this. 7 This is one that I think a 8 little bit kind of defies understanding. 9 Either the fellow went very fast when he 10 was writing stuff down -- very fast when 11 he was creating this memo and didn't 12 bother to understand it all. But that one 13 just makes no sense. 14 Q. Did Mr. Cornstein ask you why 15 your strategy was not exploited by others? 16 A. He might have. I don't remember 17 the specific question. 18 Q. Did the people at this meeting 19 know that Ascot was formed in 1992 and had 20 been trading continuously since that time, 21 so that the remark that it never had a 22 negative calendar quarter went back to 23 sometime in late 1992? 24 A. I don't remember if we had given 25 them the record going back to inception</p>	<p style="text-align: right;">321</p> <p>1 Merkin - Direct/Bamberger 2 back, if it was asked, to the answer we 3 talked about before, which is you need to 4 be pretty big to get the flow. And then 5 if you're the Street the which you think 6 of the Street, you end up with legal 7 restrictions and regulatory issues. 8 That's not scalable. 9 Q. Sorry. 10 What does it mean for a strategy 11 not to be scalable? 12 A. It means different things in 13 different contexts. 14 Broadly speaking, it means that 15 you can run \$100 million in a strategy 16 efficiently and profitably, but may not be 17 able to run \$500 million in that strategy. 18 Or it means you can run \$500 million of 19 that strategy, or it means you can run \$20 20 billion from that strategy and you may not 21 be able to run 40 or 50. 22 Q. And that was certainly an issue 23 that you had for Mr. Madoff, right, sir? 24 A. Scaling of his business? 25 Q. Yes.</p>

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<p>1 Merkin - Direct/Bamberger</p> <p>2 A. That's something that he and I</p> <p>3 discussed as a light motif all the time.</p> <p>4 Q. That did worry you, right?</p> <p>5 A. Worry -- it was an issue for</p> <p>6 anybody who had -- who was scaling up</p> <p>7 assets.</p> <p>8 It was an issue that was</p> <p>9 prevalent in the money management industry</p> <p>10 throughout a prolonged bull market.</p> <p>11 Q. At the meeting did you make any</p> <p>12 commentary as to what percentage of your</p> <p>13 personal family assets were invested in</p> <p>14 Ascot?</p> <p>15 A. I think I might have. I would</p> <p>16 never have said 60 percent of the assets</p> <p>17 come from my personal family assets. Mr.</p> <p>18 Sinscheimer had the audits. The fund was</p> <p>19 about a billion-7. 60 percent would be a</p> <p>20 billion dollars.</p> <p>21 There's not a chance that I</p> <p>22 suggested that a billion dollars of family</p> <p>23 money was in Ascot. Not a chance.</p> <p>24 If that is what Mr. Sinscheimer</p> <p>25 understood, I would wonder why he thought</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 please?</p> <p>3 A. Just one moment.</p> <p>4 (The witness complies.)</p> <p>5 Q. I'd like to direct your</p> <p>6 attention to Exhibit 1, please.</p> <p>7 A. Binder one is tab 1.</p> <p>8 Q. Binder 1, tab 1.</p> <p>9 A. Got it.</p> <p>10 Q. And if you could thumb through</p> <p>11 the document. Do you see that this is a</p> <p>12 document that Mr. Straus signed on March</p> <p>13 26, 1999 pursuant to which he invested \$3</p> <p>14 million into Ascot?</p> <p>15 (The witness reviews document.)</p> <p>16 A. Yep, looks that way.</p> <p>17 Q. Okay. And he lived in New</p> <p>18 Jersey at the time, correct?</p> <p>19 A. I have to turn the page.</p> <p>20 Yes.</p> <p>21 Q. Okay. Now, on the first</p> <p>22 paragraph of that document, there's a</p> <p>23 reference in the bottom of that paragraph</p> <p>24 to a confidential offering memorandum of</p> <p>25 the partnership dated June 1998.</p>
323	325
<p>1 Merkin - Direct/Bamberger</p> <p>2 I was coming to make a presentation for</p> <p>3 what ended up as a \$3 million investment</p> <p>4 at a 1½ percent management fee if I had a</p> <p>5 billion dollars of my own money in the</p> <p>6 strategy. This just doesn't make any</p> <p>7 sense.</p> <p>8 MR. BAMBERGER: I move 64 into</p> <p>9 evidence, please?</p> <p>10 MR. LEVANDER: I object. This</p> <p>11 witness didn't write this. This is</p> <p>12 loaded with errors. Mr. Sinscheimer</p> <p>13 is going to be called. He's going to</p> <p>14 testify that there are errors in that</p> <p>15 document. Let's wait until</p> <p>16 Mr. Sinscheimer comes.</p> <p>17 MR. BAMBERGER: I withdraw my</p> <p>18 request.</p> <p>19 Everything that Mr. Levander</p> <p>20 said is true. Not the part about a</p> <p>21 lot of errors, but that</p> <p>22 Mr. Sinscheimer is going to come.</p> <p>23 BY MR. BAMBERGER:</p> <p>24 Q. Okay, you can put that down.</p> <p>25 Can you pick up Binder 1,</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 Do you see that?</p> <p>3 (The witness reads document.)</p> <p>4 A. Yes.</p> <p>5 Q. And this is in fact a document</p> <p>6 to be used for transactions in Ascot</p> <p>7 Partners, correct?</p> <p>8 A. Not as you said it, no. It's</p> <p>9 not used for transaction -- this is part</p> <p>10 of a subscription agreement.</p> <p>11 Q. Right.</p> <p>12 A. Okay.</p> <p>13 Q. When a person invests \$3 million</p> <p>14 they have to sign a subscription</p> <p>15 agreement, correct?</p> <p>16 A. Right.</p> <p>17 Q. Now, are you aware that your</p> <p>18 counsel has not produced a confidential</p> <p>19 offering memorandum of Ascot dated June</p> <p>20 1998?</p> <p>21 A. No.</p> <p>22 Q. Okay. Well, let me represent</p> <p>23 that to be the case.</p> <p>24 Do you have any explanation for</p> <p>25 why that is? Why an investor is signing a</p>

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<p style="text-align: right;">326</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 subscription agreement and making</p> <p>3 reference to an offering memorandum that</p> <p>4 no one has been able to find?</p> <p>5 A. Does -- does the person who</p> <p>6 signed the subscription agreement have the</p> <p>7 offering memorandum?</p> <p>8 Q. No.</p> <p>9 A. No.</p> <p>10 Q. Do you see in the first line it</p> <p>11 says: "The undersigned is executing and</p> <p>12 delivering this agreement in connection</p> <p>13 with this subscription for an additional</p> <p>14 limited partnership interest"?</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. That's inaccurate, correct?</p> <p>18 This is Mr. Straus's first investment in</p> <p>19 Ascot, correct?</p> <p>20 A. I don't know. If you say so --</p> <p>21 Q. I'll represent that to be the</p> <p>22 case.</p> <p>23 A. If you represent that to be the</p> <p>24 case, then I'm sure you're right.</p> <p>25 Q. I'm representing to you he made</p>	<p style="text-align: right;">328</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. Let's see...</p> <p>3 Looks that way.</p> <p>4 Q. By this time were you chairman</p> <p>5 of the investment committee at Yeshiva</p> <p>6 University?</p> <p>7 A. When was this time?</p> <p>8 Q. By April 1 of 1999.</p> <p>9 A. I think so.</p> <p>10 Q. And were you a member of the</p> <p>11 Board of Trustees of Yeshiva University by</p> <p>12 that date?</p> <p>13 A. I don't think so.</p> <p>14 Q. How did you become Chairman of</p> <p>15 the investment committee of Yeshiva</p> <p>16 University?</p> <p>17 A. Several members of the</p> <p>18 investment committee asked me to become</p> <p>19 the chairman.</p> <p>20 MR. BAMBERGER: I move this</p> <p>21 document into evidence at this time.</p> <p>22 MR. LEVANDER: No objection.</p> <p>23 (Claimant's Exhibit 2, received</p> <p>24 in evidence.)</p> <p>25 BY MR. BAMBERGER:</p>
<p style="text-align: right;">327</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 his first investment effective as of April</p> <p>3 1, 1999, and signed this and only this</p> <p>4 document in connection with that</p> <p>5 investment.</p> <p>6 And my question is:</p> <p>7 Why would he sign a form that</p> <p>8 says that he's subscribing for an</p> <p>9 additional limited partnership interest;</p> <p>10 do you know?</p> <p>11 A. No.</p> <p>12 MR. BAMBERGER: I move that</p> <p>13 document into evidence.</p> <p>14 MR. LEVANDER: No objection.</p> <p>15 (Claimant's Exhibit 1, received</p> <p>16 in evidence.)</p> <p>17 BY MR. BAMBERGER:</p> <p>18 Q. Turning your attention to tab 2,</p> <p>19 that's the investor questionnaire that</p> <p>20 Mr. Straus would have completed at that</p> <p>21 time?</p> <p>22 (The witness reviews document.)</p> <p>23 A. Just one moment.</p> <p>24 Q. Directing you to pages 10 and 11</p> <p>25 in particular.</p>	<p style="text-align: right;">329</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. Directing your attention to the</p> <p>3 third document, tab 3.</p> <p>4 (The witness complies.)</p> <p>5 Q. I represent to you that this is</p> <p>6 a form of limited partnership agreement of</p> <p>7 Ascot dated as of November 6 of 1999.</p> <p>8 Do you see that?</p> <p>9 A. No.</p> <p>10 Q. The bottom of tab 3. The first</p> <p>11 page.</p> <p>12 A. It's 1992, not 1999.</p> <p>13 Q. Excuse me, '92.</p> <p>14 Was this the first limited</p> <p>15 partnership agreement of Ascot?</p> <p>16 A. I think so.</p> <p>17 Q. And this document provides that</p> <p>18 you will use your best efforts to manage</p> <p>19 the affairs of the partnership, correct?</p> <p>20 A. I wouldn't be surprised if it</p> <p>21 said that. I'm just -- if you'll turn me</p> <p>22 to a page, a provision.</p> <p>23 Q. Paragraph 7 on page 14.</p> <p>24 A. Page 14. Paragraph 7?</p> <p>25 Q. .01.</p>

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<p style="text-align: right;">330</p> <p>1 Merkin - Direct/Bamberger 2 (The witness reads document.) 3 A. Yes, it says that. 4 Q. You understood that was an 5 obligation over and above a normal 6 contractual good faith obligation; that 7 that implies that you need to use the best 8 efforts to your personal capability in 9 managing the affairs of this partnership, 10 correct? 11 A. I'm not sure that I knew at that 12 time or remember today that I knew at that 13 time a distinction between a best efforts 14 obligation and however you described the 15 other one. 16 Q. Turning your attention to 17 "Liability of General Partners," 7.04, on 18 page 16. 19 (The witness complies.) 20 A. 7.04. 21 Q. Yes. 7.04 on page 16. 22 A. I got it. 23 Q. This limitation says that you 24 won't be responsible for "acts or 25 omissions unless due to bad faith, gross</p>	<p style="text-align: right;">332</p> <p>1 Merkin - Direct/Bamberger 2 negligence" and "recklessness" are the two 3 different terms, correct? 4 A. We just got done saying five 5 different terms were used. So it's not 6 two. 7 Q. Your offices were at 455 Park 8 Avenue by this time, correct? 9 A. '92, I would think so. 10 MR. BAMBERGER: I move this 11 document into evidence at this time. 12 MR. LEVANDER: No objection. 13 (Claimant's Exhibit 3, received 14 in evidence.) 15 BY MR. BAMBERGER: 16 Q. Turn your attention to tab 4. 17 (The witness complies.) 18 A. Page 4. 19 MR. LEVANDER: Tab 4. 20 Q. Tab 4. 21 A. I got it. 22 Q. This is an amended and restated 23 LPA of Ascot? 24 A. Yes. 25 Q. Why did you issue this?</p>
<p style="text-align: right;">331</p> <p>1 Merkin - Direct/Bamberger 2 negligence, recklessness, fraud or 3 intentional misconduct," correct? 4 A. Yes. 5 Q. In your understanding, when you 6 proposed this document to investors you 7 were lining up those five exceptions in 8 terms of relative mens rea; from the least 9 culpable to the most culpable, true? 10 A. As I sit here today, I don't 11 remember if that's what I thought 20 years 12 ago. And I'd be surprised if I did. 13 Because I think I hear that 14 suggestion of five in a row with ascending 15 something, or descending something, for 16 the first time. 17 Q. So certainly you'll grant me 18 that gross negligence is not the only 19 thing you're responsible for; other things 20 include bad faith and recklessness, 21 correct? 22 A. Intentional misconduct is 23 covered. What I think isn't covered, what 24 is specifically exculpated, is negligence. 25 Q. Certain terms were used. "Gross</p>	<p style="text-align: right;">333</p> <p>1 Merkin - Direct/Bamberger 2 A. I don't remember the specific 3 legal issues or change in regulatory 4 latticework that may have caused counsel 5 to advise us to issue new documents, and 6 there may have been change -- I just don't 7 remember. 8 Q. Forgetting all the latticework, 9 is it at this time you increased your fee, 10 so you needed to enter into a new 11 partnership agreement with your partners? 12 A. That might have been it. 13 Q. Now, when you issued this, you 14 didn't issue a new, fresh offering 15 memorandum, correct, when you sent this 16 around to your limited partners? You 17 didn't issue a revised offering memorandum 18 to existing investors, correct? 19 A. I'm not sure that's correct. 20 Q. Well, why would you send an 21 offering memorandum to all of your 22 existing investors if they haven't shown 23 an interest in making a new investment and 24 you're not soliciting them for more funds? 25 Why would you send them an offering</p>

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<p style="text-align: right;">334</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 memorandum?</p> <p>3 A. I would have done so if that's</p> <p>4 what legal counsel advised, and I might</p> <p>5 have done so if there was a change in the</p> <p>6 fee structure.</p> <p>7 Q. You think it would be necessary</p> <p>8 to send an offering memorandum if there is</p> <p>9 a change in the fee structure?</p> <p>10 A. If that's what legal counsel</p> <p>11 advised, that's what I would have done.</p> <p>12 Q. You're aware, are you not, that</p> <p>13 you did send a letter to all Ascot</p> <p>14 investors advising them of the proposed</p> <p>15 fee structure and advising them that they</p> <p>16 had the right to exit, correct?</p> <p>17 A. Correct.</p> <p>18 Q. If you sent them that letter,</p> <p>19 you wouldn't also send them an offering</p> <p>20 memorandum, correct?</p> <p>21 A. I'm not sure. If legal counsel</p> <p>22 said send them an offering memorandum, we</p> <p>23 would have drafted up an offering</p> <p>24 memorandum and sent it to them.</p> <p>25 I don't know that they did. I</p>	<p style="text-align: right;">336</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 need -- or what kind of partnership needed</p> <p>3 to register.</p> <p>4 Q. And that was only for new</p> <p>5 investors, correct? That would be subject</p> <p>6 to the longer lockup. Prior investors</p> <p>7 would be grandfathered, correct?</p> <p>8 A. The simple truth of the matter</p> <p>9 is that in the event it didn't work out</p> <p>10 that way. So I don't know what I was</p> <p>11 thinking for a four-month period. You may</p> <p>12 recall that the SEC lost the case in</p> <p>13 Washington. And the steps we took in</p> <p>14 April of 2006 we untook.</p> <p>15 Q. Right. That was the Goldstein</p> <p>16 case, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And the Court found that the SEC</p> <p>19 exceeded its powers by imposing this</p> <p>20 two-year requirement?</p> <p>21 A. Correct.</p> <p>22 MR. BAMBERGER: I move Number 5</p> <p>23 into evidence, please.</p> <p>24 MR. LEVANDER: No objection.</p> <p>25 (Claimant's Exhibit 5, received</p>
<p style="text-align: right;">335</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 am just saying, I would have done it on</p> <p>3 the advice of a lawyer.</p> <p>4 Q. Your counsel was Schulte at that</p> <p>5 time, right?</p> <p>6 A. Yes.</p> <p>7 MR. BAMBERGER: I move this</p> <p>8 document into evidence as Number 4.</p> <p>9 MR. LEVANDER: No objection.</p> <p>10 (Claimant's Exhibit 4, received</p> <p>11 in evidence.)</p> <p>12 BY MR. BAMBERGER:</p> <p>13 Q. Turning your attention to tab 5.</p> <p>14 That's the second amended LPA.</p> <p>15 Do you have any recollection of</p> <p>16 why this document was prepared?</p> <p>17 A. This document I think was</p> <p>18 prepared because we made a change or we</p> <p>19 were seeking approval for a change that I</p> <p>20 would think of as rather more material</p> <p>21 than the change in the fee structure,</p> <p>22 which is the lockup was being extended</p> <p>23 very considerably in response to proposed</p> <p>24 changes by the Securities and Exchange</p> <p>25 Commission in terms of who did or didn't</p>	<p style="text-align: right;">337</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 in evidence.)</p> <p>3 BY MR. BAMBERGER:</p> <p>4 Q. And Number 6 -- you just</p> <p>5 referenced that Federal case.</p> <p>6 Number 6 was issued as a result</p> <p>7 of that Federal case?</p> <p>8 A. Yeah. I mean, we had gotten</p> <p>9 people's agreement. We didn't feel we</p> <p>10 needed to hold their money that long given</p> <p>11 the liquidity of Ascot, so I undid the</p> <p>12 steps that we had taken -- I undid in the</p> <p>13 fall steps we had taken in the spring.</p> <p>14 Q. And you went back to a one-year</p> <p>15 lockup?</p> <p>16 A. I think it was a one-year</p> <p>17 lockup.</p> <p>18 Q. With Gabriel you never used a</p> <p>19 high water mark concept, did you?</p> <p>20 A. Too many double negatives.</p> <p>21 The answer is we did. The</p> <p>22 answer to the question is we did.</p> <p>23 Q. You did use a high watermark for</p> <p>24 Gabriel?</p> <p>25 A. Yes, we had a down year and we</p>

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<p>1 Merkin - Direct/Bamberger 2 said we could take the incentive fee only 3 above the high watermark. 4 Should I explain that? 5 Q. No. 6 A. Okay. 7 Q. In 2006 did Gabriel still use a 8 high watermark? 9 A. I would assume so, but I just 10 don't remember sitting here. I think the 11 high watermark was one that we said we 12 would accept. 13 We had had one down year 14 subsequent to that. We said we would 15 accept a high watermark; wrote that to all 16 the investors near the fourth quarter that 17 year. And, of course, used it and, you 18 know -- used it in terms of calculating 19 any relevant fees. 20 Don't know whether it made its 21 way into the document or not. 22 MR. BAMBERGER: I move 6 into 23 evidence. 24 A. We had very little applicable to 25 Ascot. There was no incentive fee.</p>	<p>1 Merkin - Direct/Bamberger 2 is what I'm representing. 3 A. I don't challenge that at all. 4 MR. BAMBERGER: I move 7 into 5 evidence. 6 MR. LEVANDER: No objection. 7 (Claimant's Exhibit 7, received 8 in evidence.) 9 BY MR. BAMBERGER: 10 Q. Turning your attention to 11 "Investment Approach" at page 5. 12 A. We're still in tab 7? 13 Q. Yes. 14 A. Okay, sorry. 15 Q. You chose to make a disclosure 16 about your investment approach, correct? 17 A. Yes. 18 Q. All right. Now, it's not true 19 that as of 1996 or '97, or '98, '99, 2000 20 or 2001, that Ascot was engaged in 21 convertible arbitrage; true? 22 A. I didn't catch all of those 23 years, but I believe that is true. 24 Q. Also true that you make a 25 distinction between index arbitrage and</p>
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<p>1 Merkin - Direct/Bamberger 2 MR. LEVANDER: No objection. 3 (Claimant's Exhibit 6, received 4 in evidence.) 5 BY MR. BAMBERGER: 6 Q. Turning to tab 7 for ID, this is 7 an offering memorandum for Ascot, correct? 8 A. I'm just a half a step behind 9 you. 7. 10 This is an offering memorandum 11 of February of '96. So... you're going 12 backwards in time. 13 Q. Sorry. February of 1996. 14 That's a couple of years before Moshael 15 invested. But as far as we know, Ascot 16 didn't issue another offering memorandum 17 until December of 2002. 18 As far as your lawyers can find 19 in your files the offering memorandum that 20 you were using for Ascot for about six and 21 a half years was the February 1996 22 offering memorandum, correct? 23 A. If that's what our lawyers have 24 told you, then I'm sure it's right. 25 Q. That's what people have found,</p>	<p>1 Merkin - Direct/Bamberger 2 options arbitrage, correct? 3 A. I'm not sure I make a 4 distinction between them, I think they are 5 very related things. 6 Q. You say Ascot engaged primarily 7 in index arbitrage, correct? 8 A. Just give me one moment. Let me 9 look at this thing. 10 (The witness reviews document.) 11 A. Yes. 12 Q. In fact, on the top of 7 you 13 say, under "Risk Factors," "The principal 14 activity of the partnership will be index 15 arbitrage and investments in other 16 securities." 17 Do you see that? 18 A. Yes. 19 Q. So a reasonable reader would 20 take that to mean you do more index 21 arbitrage and you do some options 22 arbitrage, understanding those to be two 23 different things, correct? 24 A. I thought I just said that I 25 wasn't sure those are two different</p>

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<p style="text-align: right;">342</p> <p>1 Merkin - Direct/Bamberger 2 things. You can do arbitrage index 3 through the use of options. 4 Q. Sir, in the next sentence you 5 make the clearest of declarative 6 statements that "These strategies are used 7 to take advantage of price disparities 8 among related securities." 9 Do you see that? 10 A. What page are you on? 11 Q. Page 5. 12 A. I was on page 7. Are you back 13 on page 5? 14 Q. I am. 15 A. Okay. 16 Q. You say all the strategies 17 you're doing are being used to take 18 advantage of price disparities among 19 related securities, right? 20 A. Uh-hum. 21 Q. You're not engaged in the 22 strategies in hopes the market's going to 23 go up? 24 A. Insofar as this sentence is 25 concerned?</p>	<p style="text-align: right;">344</p> <p>1 Merkin - Direct/Bamberger 2 (The witness reads document.) 3 Q. Do you contend that what 4 Mr. Madoff was doing falls into any of 5 those categories in that sentence? 6 A. Highly, highly unlikely. Unless 7 his business evolved to those. 8 But I'd say basically, no. 9 Q. Okay. So the reader of these 10 clauses so far would understand two 11 things: 12 One, that your partnership 13 engages in certain activities, and that 14 you may also make investments in other 15 investment entities, but so far as you 16 know those other investment entities do 17 not include Mr. Madoff. 18 Correct? 19 (The witness reads document.) 20 A. I think you went a little bit 21 too far. 22 We reserve the right to make 23 many kinds of different investments 24 precisely because we weren't tethered to 25 one strategy.</p>
<p style="text-align: right;">343</p> <p>1 Merkin - Direct/Bamberger 2 Q. Right. 3 A. This sentence described what I 4 would say is an arbitrage strategy. 5 You're trying to arbitrage price 6 disparities, not between identical 7 securities -- which is how you presented 8 arbitrage only several hours ago -- but 9 among related securities things that 10 convert from one to the other, which is 11 why we might have had an interest in 12 convertible arbitrage, or things that are 13 struck against each other, which we have 14 an interest in options that struck on 15 stocks, because at some point we are 16 arbitrating price disparities between the 17 underlying security and the thing that is 18 struck against it, or, way back when, 19 converted. 20 Q. Could you look at the next 21 sentence, please, and read the entire next 22 sentence to yourself. 23 A. The one that begins "With the 24 partnership..."? 25 Q. Yes.</p>	<p style="text-align: right;">345</p> <p>1 Merkin - Direct/Bamberger 2 Q. But the intent of these 3 sentences is to say that the partnership 4 does certain things, and we may also place 5 money with others to do similar things. 6 Correct? 7 A. I don't know about the "similar" 8 part. 9 Q. "Similar" is your word, sir. 10 "Which engage in similar investment 11 strategies." 12 The word "similar" there would 13 have to be similar to what we've already 14 described the partnership itself does? 15 A. No. Certainly not. If you give 16 me a moment, I'll read it again. I don't 17 think that's what that sentence says. 18 Q. When it speaks of "similar 19 strategies" in that sentence, similar to 20 what? 21 (The witness reads document.) 22 A. Including investments in funds, 23 partnerships -- I'm sorry -- 24 Q. I don't need it read to me, sir. 25 A. Investments in mutual funds,</p>

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<p style="text-align: right;">346</p> <p>1 Merkin - Direct/Bamberger 2 private partnerships, closed-end funds and 3 other pooled vehicles which engage in 4 investment strategies similar to the ones 5 that we might benefit from if we invested 6 in funds, private investment partnerships 7 or closed-end funds. 8 This refers to similar 9 strategies in a different structure. 10 Q. By this time substantially all 11 capital placed with Ascot for investment 12 was being transferred to Mr. Madoff's 13 accounts, correct? 14 Accounts of Ascot being 15 maintained at the Madoff firm, correct? 16 Substantially all? 17 A. You asked me too many questions. 18 I don't follow you. 19 Q. To simplify it, by this time 20 Mr. Madoff was managing substantially all 21 of Ascot's portfolio, correct? 22 A. This is February of '96? 23 Q. Correct. 24 A. Yes. 25 Q. And you agree that in this</p>	<p style="text-align: right;">348</p> <p>1 Merkin - Direct/Bamberger 2 disclosure, correct? 3 A. You pointed to "similar 4 investment strategies"? 5 Q. Sir, I ask you to listen to me. 6 You gave an answer that said 7 very unlikely that Mr. Madoff is subsumed 8 within, falls within, the defined term 9 "other investment entities" in the first 10 full paragraph under "Investment 11 Approach." Correct? 12 (The witness reads document.) 13 A. Correct. 14 Q. So all of these things that 15 Mr. Levander talked about, when the 16 partnership engages, none of that has to 17 even do with Mr. Madoff; true? 18 A. I just don't follow. All other 19 things -- just direct me, focus me. 20 Q. That's an answer. I tried to 21 focus you. 22 A. You want to try again? 23 Q. No. 24 A. Okay. When you say Mr. Levander 25 talks about, I don't know what you're</p>
<p style="text-align: right;">347</p> <p>1 Merkin - Direct/Bamberger 2 memorandum Mr. Madoff is not mentioned in 3 any capacity, there's just no reference to 4 him at all? 5 A. I believe that's true. Okay. 6 The strategy is described -- the strategy 7 is described as the principal strategy -- 8 Q. Sir, it's not necessary for you 9 to comment. Let me ask the simplest 10 question I can and you give the simplest 11 answer you can. We should both be better 12 at it. 13 In the sentence, when the 14 partnership engages in directing 15 investments in other investment entities, 16 from what I heard you just say, that does 17 not mean Mr. Madoff because Mr. Madoff is 18 not one of those other defined investment 19 entities; true? 20 A. I don't understand your 21 question. 22 Q. You just said that it is very, 23 very unlikely that Mr. Madoff falls within 24 the defined term "other investment 25 strategies" in the first paragraph of this</p>	<p style="text-align: right;">349</p> <p>1 Merkin - Direct/Bamberger 2 referring to. 3 Q. Turn to the top of page 6. It 4 says that "the managing partner intends, 5 to the extent circumstances permit, to 6 adopt a selective approach in evaluating 7 potential investment situations, generally 8 concentrating on relatively fewer 9 transactions that he can follow more 10 closely." 11 Right? 12 A. That's what it says. 13 Q. That bears no correspondence 14 whatsoever to what Mr. Madoff is doing, 15 correct? He's investing in lots of 16 companies, coming in and out of the market 17 all the time. 18 You're not really concentrating 19 on anything with respect to that, are you? 20 A. Too long a question. 21 This is exactly perhaps what we 22 were looking for. This says that we are 23 going to concentrate on a strategy. 24 Q. All right. And then on 7 you 25 begin to talk about risk factors, correct?</p>

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<p style="text-align: right;">350</p> <p>1 Merkin - Direct/Bamberger 2 A. Yes. We addressed that 3 paragraph before, I think. 4 Q. All right. Correct. 5 By the way, when you served on 6 the faculty of the Benjamin N. Cardozo Law 7 School, that's right on top of that place, 8 that's 11 years you were there, on the 9 faculty? 10 A. Sounds right. 11 Q. That's a school of Yeshiva 12 University? 13 A. That is the law school of 14 Yeshiva University. 15 Q. What did you do on the faculty? 16 A. Taught a number of different 17 classes. For one, I think I taught -- at 18 one point I think I took over and taught 19 some first-year contracts classes, and 20 taught some topics that related to either 21 security -- I'm sorry, corporate finance, 22 negotiating, and very elementary 23 structuring of documents. 24 Q. Okay. The discussion about 25 options transactions that appears on 7, is</p>	<p style="text-align: right;">352</p> <p>1 Merkin - Direct/Bamberger 2 Q. Okay. Neither of us needs to 3 repeat himself. 4 Is there any reason why this 5 paragraph speaks only of stock options on 6 a registered option exchange, and doesn't 7 mention OTC options? 8 A. I'm -- I just don't remember the 9 conversations that resulted in this 10 particular sentence. 11 Q. Okay. By this time Mr. Madoff 12 certainly was not buying and selling stock 13 options, correct? He was selling index 14 options, buying and selling index options, 15 correct? 16 A. "By this time" is '96? 17 Q. Yes. 18 A. I just forgot. Let me look at 19 the page. Yes, this is '96. 20 Yes. I think that's correct. 21 Q. The reference below that says 22 "arbitrage transactions." That's a 23 reference to merger arbitrage? 24 A. I think that's correct. 25 Q. And then later in the document</p>
<p style="text-align: right;">351</p> <p>1 Merkin - Direct/Bamberger 2 that intended to be a reference to 3 Mr. Madoff's activities? 4 A. I'll tell you in a moment. 5 (The witness reads document.) 6 A. It might be -- you're talking 7 about just the first paragraph? 8 Q. Yes. 9 A. In part, yes. 10 Q. So are you telling the world you 11 were using options for both arbitrage and 12 hedging, two different purposes? 13 (The witness reads document.) 14 A. Sure. That's exactly what you 15 use options for. 16 Q. All right. 17 A. You hedge losses and you 18 arbitrage the things that those options 19 are struck against. 20 That's why in the same paragraph 21 you talk about the use of options, for 22 example, in risk arbitrage and merger 23 arbitrage, because at the end of the day 24 you can't lose more than you put up for 25 the cost of the call.</p>	<p style="text-align: right;">353</p> <p>1 Merkin - Direct/Bamberger 2 you talk about possible investments in 3 bankruptcy situations, other transactions, 4 proxy contests, maybe we'll buy some 5 commodities, maybe we'll do some short 6 selling. 7 Do you see that? 8 A. I'm getting there as I turn the 9 page. 10 Q. You're putting the reader on 11 notice that you're considering all of 12 those things, right? 13 A. Yes. 14 Q. Why didn't you just tell the 15 reader what you actually were doing was 16 that substantially all the assets were 17 with Bernie Madoff, just like Fairfield 18 Sentry had disclosed? 19 A. Because we didn't want to be 20 Fairfield Sentry. 21 Q. Why didn't you just be clear 22 with people, this is what we're doing 23 today and we reserve the right to change 24 it tomorrow, in whole or in part -- 25 A. Okay. So --</p>

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<p style="text-align: right;">354</p> <p>1 Merkin - Direct/Bamberger 2 Q. -- but you should know how we're 3 doing this? 4 A. -- we told the reader what the 5 primary strategy was. We described the 6 primary strategy. We told the reader we 7 were using third parties. We told the 8 reader all of it could be one-third party. 9 Q. Did you tell the reader you 10 could put it with one-third party? 11 A. I believe so. 12 Q. Show me where. 13 A. Let me take a minute and finish 14 my sentence. 15 We told the reader there was 16 custodial risk that was connected with one 17 or other third party. 18 Q. The more assets you put with 19 somebody the greater custodial risk you 20 were taking, isn't that right, sir? 21 A. Well, at the end of the year, 22 you put 100 percent of your assets 23 someplace -- 24 Q. Right. But there's the 10 25 percent rule --</p>	<p style="text-align: right;">356</p> <p>1 Merkin - Direct/Bamberger 2 recognizing that a Ponzi scheme is an 3 omnipresent risk? 4 A. I'm not aware of any sharp 5 increase in that trend in that period of 6 time. 7 Q. Sir, turn to the bottom of 10, 8 please. 9 Do you see the caption for the 10 bottom-most paragraphs, "Independent Money 11 Managers"? 12 A. Uh-hum. 13 Q. I haven't added it up, but is it 14 correct to say that every time there's a 15 reference to a third-party it's always to 16 "independent money managers," always using 17 an "s," maybe 10 or 12 times in that 18 paragraph? 19 A. I haven't totalled it up. But 20 this certainly doesn't suggest that we 21 have to use money managers. It says we 22 may. 23 Q. Well, it says "we may put all or 24 a portion of your money with others." 25 So it could have easily said,</p>
<p style="text-align: right;">355</p> <p>1 Merkin - Direct/Bamberger 2 A. -- so there's custodial risk 3 where you put assets. 4 Q. That's why you don't put all of 5 your eggs in one basket; because a guy may 6 abscond with your basket? 7 A. I'm not sure what you're saying. 8 Q. Isn't it true by the late '90s, 9 that there were increasing amounts of 10 attention paid in the hedge fund world to 11 the need to do due diligence and the need 12 to be alert to Ponzi schemes? 13 A. Will you just remind me, for 14 purposes of answering your question, 15 roughly when the Bayou scandal was, if you 16 know the answer? 17 Q. 2005. When he goes off the 18 bridge and says he is committing suicide. 19 A. When is that? 20 Q. 2005. 21 A. So it's not the late nineties. 22 Q. From the late nineties to 2005 23 there's increasing attention paid in the 24 hedge fund industry to formalizing due 25 diligence, doing it more aggressively and</p>	<p style="text-align: right;">357</p> <p>1 Merkin - Direct/Bamberger 2 with one or more independent money 3 managers, right? 4 A. You just said all or a portion 5 with a money manager. 6 Q. All other things being equal, if 7 you put your money with two money managers 8 rather than one, you'll do 50 percent 9 better -- assuming there's a Ponzi scheme, 10 you'll do 50 percent better if only you 11 put your money with two different 12 managers, rather than one? That would be 13 a very simple way to hedge your portfolio 14 against the risk of a Ponzi scheme; true? 15 A. That's not what you're looking 16 for when you hedge your portfolio. 17 The answer to your question is 18 consider what happened in the fall of 19 2008. If you had two managers, you were 20 concerned about strictly Ponzi risk -- 21 that's the only reason, the only factor 22 using and allocating your portfolio -- you 23 gave money to any money manager that 24 cleared Lehman, and had money with Madoff. 25 Q. This time when you used the</p>

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<p>1 Merkin - Direct/Bamberger 2 phrase "other investment entities," you 3 used it as a defined term, did you mean it 4 the same way you meant it the first time? 5 It seems to me you've defined it twice and 6 differently. 7 A. I would have to spend a few 8 minutes to read both of these and try to 9 get an answer to your question. 10 Q. But do you recognize in that 11 paragraph that a risk of placing your 12 money any time you deal with others is the 13 risk associated with lack of custody? 14 That is something you -- 15 A. You went too fast. I didn't 16 hear you. 17 MR. BAMBERGER: Withdrawn. 18 A. I think that paragraph discusses 19 risk of loss with funds invested with 20 another money manager. And it's not 21 insured. And the investor is liable for 22 the risk of loss. 23 Q. Would you agree with me, sir, 24 that, in general, that this offering 25 memorandum gives the impression that</p>	<p>1 Merkin - Direct/Bamberger 2 protect the position; we sell calls to 3 finance in part the sale of the puts? 4 There's none of that discussion 5 in the '96 offering memorandum, correct? 6 A. I don't know where the Fairfield 7 discussion comes from, but if it's after 8 the trading directive, you're right. And 9 I'm not sure it accurately describes 10 options. 11 We weren't Fairfield. We didn't 12 want a Fairfield document. We weren't 13 taking Fairfield fees. Fairfield, for its 14 good and well reasons, was taking, I 15 believe, an incentive fee. 16 We were taking a management fee 17 and trying to convey to the investor that 18 that's what we think we deserve because 19 the strategies were basically allocating 20 money out. 21 Q. Well, the reason you only 22 charged a management fee is because the 23 profits were not expected to be terribly 24 big. You were regularly underperforming 25 the S&P 500, but you were making money</p>
359	361
<p>1 Merkin - Direct/Bamberger 2 you're doing one thing principally -- 3 namely, index arbitrage -- and that you're 4 reserving the right to do many other 5 different things? 6 A. You asked me what I think this 7 document gives the impression? 8 Q. Yes. 9 A. This document gives the 10 impression that we had a principal 11 strategy that is described that we have 12 the right to use only one outside manager; 13 we have the right to use a number of 14 outside managers, we can have it all in 15 one place; there's custody risk; there's 16 third-party risk; that we're not 17 necessarily managing the money; and that 18 we're supervising the portfolio and making 19 allocation decisions. 20 Q. You would agree with me that 21 nowhere does this offering memorandum 22 disclose, as Fairfield Sentry was doing by 23 '93, '94, '95, that this is our precise 24 strategy: We buy stocks; we try to 25 achieve a long/short bias; we buy puts to</p>	<p>1 Merkin - Direct/Bamberger 2 each and every quarter; and, therefore, it 3 was safe an investment, and the limited 4 fee would attract those people who were 5 trying to be safe with their money? That 6 was the true reason? 7 A. I don't think so. I think if 8 you recognized that it was the case that 9 we underperformed the S&P, then you would 10 recognize it was just basically a lower 11 correlation strategy. And that's what we 12 were looking for. 13 Lower returns, lower volatility 14 and higher liquidity. 15 Q. But by 2000 you certainly 16 greatly outperformed the S&P 500, correct? 17 A. It all depends on point in time. 18 A moment ago you said we didn't. 19 Q. Come rain or shine, whether the 20 S&P was down 10 percent, 20 percent, Ascot 21 Partners remained the same? And we'll 22 look at the exact numbers when we're 23 fresh. But that was the story? 24 A. I keep thinking, it's a lower 25 correlation strategy. If the S&P was up</p>

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362	364
<p>1 Merkin - Direct/Bamberger 2 40, we were so widely ope -- you know, 3 wildly left in the dust by the S&P that we 4 could be choking on it. 5 Q. Right. 6 A. You have it several different 7 ways. And you can't have it several 8 different ways. 9 Q. Well, it's actually you that 10 wants it several different ways; isn't it, 11 sir? 12 A. I would say strongly to the 13 contrary. 14 MR. BAMBERGER: I move 7 into 15 evidence. 16 MR. LEVANDER: No objection. 17 BY MR. BAMBERGER: 18 Q. Turning your attention to 8 -- 19 A. Yes, sir. 20 Q. -- Tab 8. Is it correct to say 21 this offering memorandum is quite similar 22 to the 1996 offering memorandum, but it 23 was issued at the time that you were 24 increasing your fee and you were 25 re-soliciting and using a new LPA,</p>	<p>1 Merkin - Direct/Bamberger 2 Q. You're saying there that, in the 3 present tense, that all decisions with 4 respect to the management of the capital 5 of the partnership are made exclusively by 6 you? That's what it says, right? That's 7 present tense. 8 A. It's in the present tense. 9 Q. And in other places where you 10 talk about third-party managers you say 11 you may do this, you may do that, but this 12 is what's happening. 13 And at the bottom of 12 you say 14 I'm making the decisions with the 15 management of the capital, right? 16 A. No. It depends on the managing 17 partner is a risk factor. 18 This is a little bit akin to 19 that sentence you showed me before in 20 connection with Madoff and the list of 21 four or five people at another fund. That 22 might have been the Fairfield. 23 At the end of the day the 24 decisions are mine. I have to allocate 25 the capital. And that's what I did.</p>
363	365
<p>1 Merkin - Direct/Bamberger 2 correct? 3 A. So you suggested before. 4 And if you think that's right, 5 that's fine with me. 6 Q. Okay, thank you. 7 One difference is on page 12. 8 Did you look there? "Other Risk Factors"? 9 A. This is page 12 of tab 8, right? 10 Q. Correct. 11 A. Okay. "Risk Factors" on page 12 12? 13 Q. We are in the "Risk Factors" 14 section -- 15 A. Okay. 16 Q. -- and I would like to draw 17 your attention to the risk factor that 18 begins, "Depending on the managing 19 partner..." 20 Do you see that, sir? 21 A. Just on the very bottom there? 22 Q. Yes. 23 A. Okay. 24 Q. That's you, correct? 25 A. Yes.</p>	<p>1 Merkin - Direct/Bamberger 2 Q. Right. Or allocate it and not 3 take it back. 4 I think we had in the other 5 case, each day you decided not to take it 6 back, right? 7 A. You totally lost me. 8 MR. BAMBERGER: Withdrawn. 9 Q. I don't want to be unfair, but 10 you said in the last arbitration one of 11 the reasons you felt you earned the 12 management fee was that you effectively 13 decided each and every day not to take the 14 money away from Mr. Madoff? 15 A. No. That was not what I said 16 just now. 17 I was referring to a 18 conversation that we had earlier today in 19 one of these looseleaf books in connection 20 with a Fairfield document. 21 I don't know what you're 22 referring to about another arbitration. 23 Q. On the top of 13 you write, 24 "Consequently, the partnership's success 25 depends to a great degree on the skill and</p>

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<p style="text-align: right;">366</p> <p>1 Merkin - Direct/Bamberger 2 experience of Mr. Merkin." 3 Do you see that? 4 A. I do. 5 Q. Do you think it's really a fair 6 disclosure, having told people that the 7 partnership is dependent upon you -- and 8 now we're in 2002, so you have been 9 conducting business exactly the same way 10 for ten years -- not to at least mention 11 Mr. Madoff, that he is also kind of 12 important to this venture? 13 A. But, again, we make it as clear 14 as possible -- you have -- 15 Q. I'm asking from the heart, sir. 16 Do you really think that's a fair -- 17 A. We made it as clear as possible 18 that we were using independent money 19 managers. We said that. We said what the 20 primary strategy was. We said that there 21 was going to be risk of everything being 22 in one place. We said that there was 23 going to be custody risk and we said that 24 at the end of the day we're not 25 quaranteeing the custody risk. That's</p>	<p style="text-align: right;">368</p> <p>1 Merkin - Direct/Bamberger 2 professional it could have been. I just 3 don't remember. 4 Q. Well, it had certain terms, 5 where the other ones didn't? 6 A. Okay. 7 Q. You had prepared a similar 8 memorandum in March of 2006; is that 9 right? 10 This is during that regulatory 11 period that we talked about. 12 A. I think so -- I don't see it. I 13 mean, you may have it in a separate tab. 14 Did we go by it and I didn't 15 notice it. 16 This would be the second of 17 those two. 18 Q. All right. Now, here, under 19 page 392 -- 20 A. Just one moment. 21 Q. -- the summary under "Investment 22 Program," you have the same statement 23 about engaging in arbitrage, although you 24 limit it to index and options. 25 You're no longer mentioning</p>
<p style="text-align: right;">367</p> <p>1 Merkin - Direct/Bamberger 2 what we said. 3 Q. Did you consider disclosing 4 Mr. Madoff in this offering memorandum and 5 decided not to do it? 6 A. I don't remember any specific 7 conversations today about what we didn't 8 think or did think of doing prior to 9 December of 2002 when we issued this. 10 MR. BAMBERGER: I move the 11 document into evidence. 12 MR. LEVANDER: No objection. 13 (Claimant's Exhibit 8, received 14 in evidence.) 15 BY MR. BAMBERGER: 16 Q. Can you turn you tab 9, please. 17 This appears to be an offering 18 memorandum of Ascot Partners dated October 19 of 2006; is that correct? 20 A. Yes. 21 Q. Okay. This is a more 22 professional and longer-looking document, 23 correct? 24 A. I guess it was done by the exact 25 same law firm. I'm not sure how more</p>	<p style="text-align: right;">369</p> <p>1 Merkin - Direct/Bamberger 2 convertible arbitrage. You throw that 3 out. But you do say that the strategies 4 are used to take advantage of price 5 disparities among related securities, 6 correct? 7 A. Yes. 8 Q. Then there's a break, and it 9 says that "The partnership primarily 10 follows..." -- and then there's a further 11 discussion. 12 Do you see that? 13 A. Yes. 14 Q. Why did you decide for the first 15 time in 2006 to disclose this strategy, 16 this further explanation about what you're 17 doing, buying a portfolio of large cap 18 equities, buying puts and selling calls? 19 A. I'm not sure this is a whole lot 20 different than what we had said before. 21 It's a primary strategy. It's an attempt 22 to present it. 23 Q. If you didn't hear my question 24 or it wasn't a clear one: 25 Why did you decide for the first</p>

93 (Pages 366 to 369)

370	372
<p>1 Merkin - Direct/Bamberger</p> <p>2 time to explain what Mr. Madoff was</p> <p>3 actually allegedly doing?</p> <p>4 A. I'm not sure we -- this</p> <p>5 description is terribly different than</p> <p>6 what we said before. This is -- I'm</p> <p>7 sorry --</p> <p>8 Q. This is 2006?</p> <p>9 A. '06.</p> <p>10 Q. Right.</p> <p>11 A. Any notions that we were doing</p> <p>12 things with single options and single puts</p> <p>13 and single calls seemed a little bit</p> <p>14 dated.</p> <p>15 We talked about the baskets and</p> <p>16 the S&Ps.</p> <p>17 This comes as no surprise to the</p> <p>18 overwhelming supermajority of the</p> <p>19 investors.</p> <p>20 Q. I understand, sir, that's your</p> <p>21 position.</p> <p>22 Certainly, if you added it up in</p> <p>23 dollars -- I bet you're right -- with the</p> <p>24 biggest players like UBP, et cetera -- I</p> <p>25 don't represent them, you know that -- I'm</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 investments through" -- and there's a long</p> <p>3 list --</p> <p>4 A. What page are you on?</p> <p>5 Q. No problem, sorry. 393. Page 2</p> <p>6 of the summary, but 393.</p> <p>7 A. Okay.</p> <p>8 Q. Here it says, "The</p> <p>9 partnership" -- which is Ascot, right?</p> <p>10 A. Yes.</p> <p>11 Q. -- "will make investments</p> <p>12 through" -- and then there's a long list,</p> <p>13 right?</p> <p>14 A. Just one moment. Yes.</p> <p>15 Q. -- "through third party</p> <p>16 managers" -- right?</p> <p>17 A. Just one moment. Yes.</p> <p>18 Q. -- "using managed accounts."</p> <p>19 A. Well, not only --</p> <p>20 Q. That's certainly a reference to</p> <p>21 Mr. Madoff, correct?</p> <p>22 A. It certainly describes</p> <p>23 Mr. Madoff, I think.</p> <p>24 Q. There's no "or" there. The rest</p> <p>25 of that sentence says you will make</p>
371	373
<p>1 Merkin - Direct/Bamberger</p> <p>2 representing a number of individual</p> <p>3 investors that claim not to know what</p> <p>4 Ascot was doing until December 11 of 2008,</p> <p>5 or very soon after that. You know that.</p> <p>6 A. What are asking me that I know?</p> <p>7 Q. You know I'm not representing a</p> <p>8 large hedge fund. I'm representing a</p> <p>9 number of individuals who said they did</p> <p>10 not know that Ascot was Madoff.</p> <p>11 A. I don't know what your clients</p> <p>12 are saying or are not saying to you.</p> <p>13 I would say the majority, both</p> <p>14 in terms of the capital, and to a lesser</p> <p>15 extent but still overwhelming majority, of</p> <p>16 the individual investors.</p> <p>17 Q. You could have made a disclosure</p> <p>18 in 2006 that I see on the bottom about</p> <p>19 what the primary strategy is, you could</p> <p>20 have disclosed that earlier, correct?</p> <p>21 Could have? It was true earlier?</p> <p>22 A. I suppose I could have said</p> <p>23 something earlier, if it was true earlier.</p> <p>24 Q. Now, the next paragraph,</p> <p>25 however, "The partnership will make</p>	<p>1 Merkin - Direct/Bamberger</p> <p>2 investments "through third-party managers</p> <p>3 using managed accounts, mutual funds,</p> <p>4 private investment partnerships,</p> <p>5 closed-end funds and other pooled</p> <p>6 investment vehicles, including special</p> <p>7 purpose vehicles, each of which is</p> <p>8 intended to engage in investment</p> <p>9 strategies similar to the Partnership's."</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. So you and the partnership were</p> <p>13 doing one thing, and you were going to ask</p> <p>14 other third parties to do something, too,</p> <p>15 and the something they do was going to be</p> <p>16 similar to what you do, right?</p> <p>17 A. No. Absolutely not.</p> <p>18 Q. With respect to -- you know who</p> <p>19 Richard Hirsch is, right?</p> <p>20 A. That is not an accurate</p> <p>21 characterization of what this says and</p> <p>22 what my intent was.</p> <p>23 Q. Right after Mr. Madoff was</p> <p>24 erected -- I said "erected."</p> <p>25 A. You did. That's not the first</p>

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<p>1 Merkin - Direct/Bamberger 2 time. 3 Q. Right after Madoff was arrested 4 a number of people came to you, sir, that 5 said, very specifically -- Richard Hirsch 6 being one of them -- I didn't understand 7 you were doing everything through Madoff; 8 I understood you were doing things that 9 were similar to Madoff, right? 10 A. No. 11 Q. Well, Richard Hirsch is one that 12 thought that, right? 13 A. I don't remember such a 14 conversation with Richard Hirsch. 15 You're talking about very late 16 in '08 or early '09? 17 Q. I'm talking about within days of 18 the arrest of Madoff or early '09. Yes, I 19 mean exactly that. 20 A. No, I don't remember such a 21 conversation. 22 Q. Do you remember Richard Hirsch 23 being very angry about his loss in Ascot? 24 A. Absolutely to the contrary. I 25 remember Richard Hirsch asking me how I</p>	<p>1 Merkin - Direct/Bamberger 2 MR. BAMBERGER: With this 3 exhibit, yes, thank you. 4 THE CHAIRMAN: -- that's fine. 5 All right. 6 BY MR. BAMBERGER: 7 Q. But is it correct to say, sir, 8 that after the Madoff arrest there were 9 people who approached you who expressed 10 surprise that Ascot -- 11 MR. LEVANDER: Objection. He 12 just said he was going to go on this 13 exhibit. You have him leads to go 14 beyond the 5 o'clock on this exhibit. 15 He is now going on to a 16 different topic. 17 MR. BAMBERGER: I'm not. I'm on 18 the same topic. 19 THE CHAIRMAN: I understand what 20 he is doing. He's questioning about 21 the scope of the investments and what 22 was understood by the investors. 23 Perhaps you could just ask it 24 generally, and then if you have 25 specific witnesses that will testify</p>
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<p>1 Merkin - Direct/Bamberger 2 was doing. I remember Richard Hirsch 3 asking me to go for a walk with him. 4 Asking me what he could do to help, could 5 he buck me up, and so on and so forth. 6 Q. Yeah, and then he learned the 7 truth. 8 MR. LEVANDER: I object to the 9 speeches. 10 Since it's past 5, I ask that we 11 adjourn for the day. But the 12 testimony from Mr. Bamberger is really 13 out of bounds. 14 MR. BAMBERGER: I'm allowed to 15 ask questions. I will withdraw that. 16 I should ask the question, what 17 you and Mr. Hirsch discussed, but it's 18 not necessary. 19 I know it is approaching the end 20 of the day. Do we need to leave right 21 on time, Mr. Chairman? 22 I have just a couple more 23 minutes. 24 THE CHAIRMAN: If you want to 25 finish with this exhibit or --</p>	<p>1 Merkin - Direct/Bamberger 2 to the contrary at some point, you 3 might bring them in, providing you 4 give them notices. 5 MR. BAMBERGER: Okay. Thank 6 you, Mr. Chairman. Those are all good 7 points, especially at 5 o'clock. 8 BY MR. BAMBERGER: 9 Q. But, sir, do you see how a 10 reasonable reader could understand that 11 you were doing certain things -- 12 A. Slowly. Slowly. Slowly. 13 Q. Do you understand however -- 14 A. Starting with everything after 15 "5 o'clock." 16 Q. Sir, do you understand that a 17 reasonable reader reading that paragraph 18 could understand that you were doing 19 certain things for the partnership and 20 that you were also placing money with 21 others who were going to do similar 22 things? 23 A. That could be the case, yes. 24 That that was the case, no. 25 It's not what it says. That is not what I</p>

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<p>1 Merkin - Direct/Bamberger 2 tell them. 3 And there wasn't an investor of 4 mine that came running into my office or 5 the telephone and said, did you read the 6 middle paragraph of page 2 of this 7 offering memorandum and it says something 8 different. 9 Q. Correct to say that the 10 partnership did not in fact make any 11 investments in a mutual fund, in or after 12 2006? 13 A. I believe that's correct. 14 Q. Correct to say that the 15 partnership did not, in fact, make any 16 investments in any private investment 17 partnerships? 18 A. We certainly considered a 19 fair -- 20 Q. No, sir, I'm sorry. This 21 says -- 22 THE CHAIRMAN: Please. 23 Q. I'm sure this is not pleasant, 24 and I apologize. But I'm simply asking a 25 question.</p>	<p>1 Merkin - Direct/Bamberger 2 A. I think we did. 3 Q. Which? 4 A. I think Mark Millennium is a 5 pooled vehicle. 6 Q. So it's both a private 7 investment partnership and another pooled 8 investment vehicle? 9 A. Almost all -- private investment 10 partnerships are pooled vehicles. 11 Q. You had no intention in 2006 to 12 alter anything about Ascot's strategy, 13 correct? 14 A. What does that mean? 15 Q. In 2006 you had not formed a 16 plan to change to any material degree 17 what Ascot was then doing, correct? 18 A. No. Not correct. 19 Q. You had developed a plan to do 20 something different than give the money to 21 Madoff? 22 A. We had certainly -- we were 23 certainly considering very seriously in 24 2006 investments that were not Madoff, 25 looked at them, and decided at some point</p>
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<p>1 Merkin - Direct/Bamberger 2 Did the partnership make 3 investments in private investment 4 partnerships, yes or no? In and after 5 2006. 6 A. I think it did. 7 Q. Which? 8 A. I think we had an investment in 9 an investment called Mark Millennium -- 10 that might be it -- that I think the 11 structure was a private investment 12 partnership. 13 Q. And the "we" in that sentence is 14 Ascot? 15 A. (No response.) 16 Q. Sir? 17 A. Yes. I'm talking about Ascot 18 Partners LP. I'm just not sure of the 19 date. 20 Q. Correct that the partnership in 21 or after 2006 did not make any investment 22 in a closed-end fund? 23 A. I think that's correct. 24 Q. You didn't make any investments 25 in any other pooled investment vehicles?</p>	<p>1 Merkin - Direct/Bamberger 2 and some point in the future not to do 3 them. 4 But considering alternatives to 5 Madoff, we absolutely did that all the 6 time. 7 Other investment ideas, 8 regardless of their structure, whether 9 they were managed accounts or a pooled 10 vehicle was something we looked at all the 11 time. 12 Q. You didn't do what you said you 13 would do here, sir, which is make 14 investments in closed-end funds and mutual 15 funds, correct? 16 A. That is incorrect. That's not 17 what this says. 18 Q. Sir, at the bottom of page 8 and 19 then we're done. That's on 399. 20 A. Bottom of page -- one second -- 21 okeydoke. 22 Q. This is a discussion of 23 brokerage commissions, correct? 24 A. Yes. 25 Q. Okay. You're certainly not</p>

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<p style="text-align: right;">382</p> <p>1 Merkin - Direct/Bamberger 2 bringing this to anybody's attention, that 3 some or all of your assets are housed with 4 Bernard L. Madoff? This is not the risk 5 factor section, for example, correct? 6 A. I don't know. I would have to 7 go back and look. 8 Q. You say on the bottom of 399, 9 "The partnership will execute its trades 10 through unaffiliated brokers, who may be 11 selected on a basis other than that which 12 will necessarily result in the lowest cost 13 for each trade." 14 You say that clearing -- 15 A. That's a perfectly good 16 example -- 17 Q. Sir, I'm going to ask a question 18 here. 19 A. Well -- 20 Q. You say "clearing, settlement 21 and custodial services will be provided by 22 one or more unaffiliated brokerage firms." 23 Correct? 24 A. Uh-hum. 25 Q. But you don't say that portfolio</p>	<p style="text-align: right;">384</p> <p>1 Merkin - Direct/Bamberger 2 that we are using third parties for 3 portfolio management. 4 Q. And you say in the sentence -- 5 A. The document suggests that 100 6 percent of the capital is managed 7 elsewhere. 8 Q. The sentence also says that 9 "between them," Madoff and Morgan Stanley, 10 "also clear the partnership's securities 11 transactions that are effected through 12 other brokerage firms," correct? 13 A. Uh-hum. 14 Q. Bernard Madoff certainly didn't 15 do that, correct? 16 A. It didn't say that he did. 17 Q. You make no distinction in that 18 paragraph between the role played by 19 Morgan Stanley and the role played by 20 Bernard L. Madoff, correct? 21 A. As it comes to principal prime 22 broker and custodian of the partnership. 23 Q. You make no distinction between 24 their roles with respect to any function, 25 correct?</p>
<p style="text-align: right;">383</p> <p>1 Merkin - Direct/Bamberger 2 management will be provided by one or more 3 unaffiliated brokerage firms; true? 4 A. That sentence does not say that. 5 Q. You say that Morgan Stanley and 6 Bernard Madoff currently serve as 7 principal prime brokers and custodians, 8 right? 9 A. Yes. 10 Q. But you don't say that either or 11 both currently serves as 98 or 99 or 99.8 12 percent portfolio managers, correct? 13 A. I missed it. Say it again. I 14 missed when you got the figures. 15 Q. You made the disclosure that 16 these folks, these two firms, serve as 17 your principal prime broker, and as 18 custodians for the partnership, but having 19 mentioned them, you don't mention that one 20 of them, Mr. Madoff, is also responsible 21 for 99 percent plus of portfolio 22 management; true? 23 A. I'm not sure that was the 24 correct number. 25 The document makes very clear</p>	<p style="text-align: right;">385</p> <p>1 Merkin - Direct/Bamberger 2 A. I'm sorry. Is that a different 3 question. 4 Q. It's intended to be a different 5 question. 6 You make no distinction between 7 the functions played by Morgan Stanley and 8 Bernard L. Madoff? 9 A. In that sentence? 10 Q. Right. 11 A. Yes. 12 Q. Anywhere else in that document 13 do you make a distinction between what 14 Morgan Stanley does and Bernard L. Madoff 15 does for Ascot Partners? Anywhere else? 16 A. I just don't remember sitting 17 here. 18 Q. I'll represent to you that you 19 don't. There's a repetition later in the 20 document, but you say nothing here. 21 Why if Bernard L. Madoff was 22 custodian for in excess of -- what number 23 should I use? 98 percent of the 24 securities? 25 A. 90.</p>

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<p style="text-align: right;">386</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. No, sir. 90?</p> <p>3 A. At certain times.</p> <p>4 Q. Of the securities? Of the</p> <p>5 securities?</p> <p>6 Cash may have come in and out of</p> <p>7 Morgan Stanley, but not securities, right?</p> <p>8 A. There were positions that we --</p> <p>9 vis-a-vis which they were housed in Morgan</p> <p>10 Stanley, security positions and cash.</p> <p>11 Q. Why did you name Morgan Stanley</p> <p>12 first?</p> <p>13 A. First? I'm sorry?</p> <p>14 Q. Why did you name Morgan Stanley</p> <p>15 first in this sentence?</p> <p>16 A. I'm not sure there's any great</p> <p>17 reasoning to it. Possibly because Morgan</p> <p>18 Stanley is the entity that an investor met</p> <p>19 first, if he invested.</p> <p>20 Morgan Stanley was our home</p> <p>21 base. Morgan Stanley was where the money</p> <p>22 came in. So you wired money to Morgan</p> <p>23 Stanley.</p> <p>24 Q. No. You wired money to Morgan</p> <p>25 Stanley.</p>	<p style="text-align: right;">388</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 Q. You can think about that and let</p> <p>3 us know tomorrow.</p> <p>4 Was the LEAPS program -- and you</p> <p>5 did engage in a few LEAPS transactions --</p> <p>6 were they cleared through Morgan Stanley?</p> <p>7 A. Yes.</p> <p>8 Q. The LEAPS were?</p> <p>9 A. Yes.</p> <p>10 Q. Any others?</p> <p>11 A. Securities.</p> <p>12 Q. Other securities were cleared</p> <p>13 through Morgan Stanley?</p> <p>14 A. I will check and tell you</p> <p>15 tomorrow, but I think there were</p> <p>16 securities that we cleared through Morgan</p> <p>17 Stanley. The LEAPS, certainly.</p> <p>18 Q. Why, if you mention that Bernard</p> <p>19 Madoff was playing the role of prime</p> <p>20 broker and as custodian, do you not also</p> <p>21 say that he was overwhelmingly responsible</p> <p>22 for portfolio management?</p> <p>23 Let me hear a clear answer to</p> <p>24 that?</p> <p>25 A. I think we said, clear as a</p>
<p style="text-align: right;">387</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 A. No, we didn't. Not if I was as</p> <p>3 in -- if the investor in order to invest,</p> <p>4 wired money to Morgan Stanley --</p> <p>5 Q. Right. And Morgan Stanley wired</p> <p>6 money to you in this case --</p> <p>7 A. I meant the investor. It was an</p> <p>8 account over which we had discretion at</p> <p>9 Morgan Stanley.</p> <p>10 That was home base. That's</p> <p>11 where investors sent their money to and</p> <p>12 that's where investors got their money</p> <p>13 back from.</p> <p>14 Q. They didn't clear any monies for</p> <p>15 Ascot in 2006?</p> <p>16 A. I don't remember specifically</p> <p>17 for 2006, but they certainly cleared</p> <p>18 securities for Ascot over time.</p> <p>19 Q. When?</p> <p>20 A. I said over time. Over the</p> <p>21 existence of the fund.</p> <p>22 Q. When?</p> <p>23 A. I'd rather be accurate than</p> <p>24 guess. I just don't remember sitting here</p> <p>25 in what years.</p>	<p style="text-align: right;">389</p> <p>1 Merkin - Direct/Bamberger</p> <p>2 bell, that we were using third parties to</p> <p>3 manage the accounts.</p> <p>4 Bernard L. Madoff was not a</p> <p>5 person who did anything other than manage</p> <p>6 the monies that were in accounts that were</p> <p>7 at Madoff.</p> <p>8 We said we were going to use</p> <p>9 third parties. We said we could use --</p> <p>10 all of it could be at a third-party. We</p> <p>11 said there was custody risk. We said that</p> <p>12 those were all risks that an investor was</p> <p>13 going to have to take.</p> <p>14 That's what this document said.</p> <p>15 We said there was a primary</p> <p>16 strategy, and we described it.</p> <p>17 Q. You understand that Bernard</p> <p>18 Madoff was controversial as a money</p> <p>19 manager by 2006, right? You understood</p> <p>20 that?</p> <p>21 A. (No response.)</p> <p>22 Q. That people regarded him --</p> <p>23 A. I think there were skeptics</p> <p>24 about Madoff in 2006.</p> <p>25 I think if you created a list of</p>

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<p style="text-align: right;">390</p> <p>1 Merkin - Direct/Bamberger 2 people that thought he was an extremely 3 talented manager, and created a list of 4 people who thought -- who thought -- who 5 had some skepticism about him, the list of 6 folks who thought he was an extremely 7 talented manager was far larger than the 8 list of people who had some skepticism. 9 Q. Before you withdrew your answer 10 you told the Attorney General in your 11 January 2009 deposition that Bernard 12 Madoff had lots of skeptics, right? 13 And then you took that answer 14 back; true? 15 A. I just -- 16 Q. True? 17 A. I'm not sure what you're saying. 18 Are you talking about an answer 19 I took back in January 2009? 20 Q. Right after giving it. 21 A. If it is right after I gave it, 22 if it's one answer, I don't remember the 23 specific question and answer. 24 Q. Okay. And true -- last 25 question -- on page 17, page JEM 408 --</p>	<p style="text-align: right;">392</p> <p>1 Merkin - Direct/Bamberger 2 General Partner, or make investments with 3 other investment entities as defined. 4 Consequently, the success of the 5 partnership may be dependent upon other 6 money managers." 7 That's what this says. It's the 8 very next sentence and the very next 9 sentence after that. 10 Q. If you read that sentence, 11 there's a three-letter little word there, 12 is there not, sir: "May"? 13 A. What are you pointing me at? 14 Q. Other times you use the present 15 tense, "engages." Other times you say 16 "will." Here you're saying "may." As 17 though it's conditional or possible, not 18 actual? 19 A. No. I think it's very clear to 20 an investor, if you come in, this is what 21 you ought to know, this is what is the 22 case, this is what could be the case, this 23 is what may evolve in the future. This is 24 a risk factor that you are tolerating. 25 Two or three sentences further</p>
<p style="text-align: right;">391</p> <p>1 Merkin - Direct/Bamberger 2 A. 17? 3 Q. Yes. 4 -- once again, you say, under 5 "Dependence on General Partner," under 6 "Risk Factors," that "All decisions with 7 respect to the management of the capital 8 of the partnership are made exclusively by 9 J. Ezra Merkin. Consequently, the 10 partnership's success depends to a great 11 degree on the skill and experience of 12 Mr. Merkin." 13 Having just mentioned Bernard 14 Madoff, but having relegated him to a 15 position of prime broker, meaning, an 16 adjunct to you, don't you think it would 17 have been more fair and more correct to 18 disclose that this partnership is also 19 dependent upon the success and the skill 20 and the experience of Bernard L. Madoff? 21 A. Go to the very next sentence. 22 And what does it say? "The General 23 Partner may delegate investment discretion 24 for all or a portion of the partnership's 25 funds to money managers other than the</p>	<p style="text-align: right;">393</p> <p>1 Merkin - Direct/Bamberger 2 down makes very clear that custody is not 3 with the General Partner. 4 Q. Mr. Merkin, thank you. 5 Two or three sentences down it 6 says that custody may not be with the 7 General Partner. 8 A. Correct. What do you think that 9 means to an investor? 10 Q. "May not be." 11 The Panel will decide. Thank 12 you. 13 You have no documentary proof 14 that your firm ever sent either the 2006 15 offering memorandum, March of 2006 or 16 October 2006, to Moshael Straus, correct? 17 A. Are you asking me a question 18 that's not about the document? 19 Q. Yes. 20 A. I didn't get the question, I'm 21 sorry. 22 Q. You have no documentary proof 23 whatsoever, of any kind, that your firm 24 ever transmitted either the March 2006 or 25 the October 2006 Ascot offering memorandum</p>

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<p style="text-align: right;">394</p> <p>1 Merkin - Direct/Bamberger 2 to Moshael Straus? 3 A. I don't know. I don't know the 4 answer to the question. I believe we sent 5 it to everybody. I'm sure Moshael was on 6 the list. I'm sure we sent it to him. 7 Q. You're sure of all that? 8 A. I'm sure he got it. 9 Q. Where's the list? 10 A. As I sit here right now? I have 11 no idea where it is. It's not in my 12 pocket. I have no idea where it is. 13 Q. Why would you produce the 14 Gabriel offering memorandum of 2006 in 15 connection with Modan and not produce 16 Ascot, if you had it? 17 A. Are you telling me he doesn't 18 have it? 19 Q. Yes. 20 A. That's news to me. Or news to 21 me today. 22 Q. Why would you send an offering 23 memorandum to an investor that's not 24 making a fresh investment in Ascot? 25 A. Who is --</p>	<p style="text-align: right;">396</p> <p>1 Merkin - Direct/Bamberger 2 Q. You send offering memo -- 3 A. Why would that confuse an 4 investor? 5 THE CHAIRMAN: Mr. Bamberger, 6 you're arguing with the witness. 7 MR. BAMBERGER: You've been more 8 than kind with me. 9 THE CHAIRMAN: You had one more 10 question to ask about 15 minutes ago. 11 We will adjourn now until 12 10 o'clock tomorrow. 13 [Time noted: 5:19 p.m.] 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">395</p> <p>1 Merkin - Direct/Bamberger 2 Q. Not indicating a desire to make 3 a new investment in Ascot. 4 A. I'm missing something pretty 5 basic. We're in '06? 6 Q. Yes. 7 A. In '06 we're telling every 8 single investor, I think, that we are 9 changing the lockup, and then we're 10 telling them we're not. 11 Q. Right. That's in the 12 partnership agreement. You don't need to 13 send the offering memorandum to do that, 14 correct? 15 A. I don't know. 16 Q. An explanatory letter that sends 17 along the new LPA would tell them why 18 you're sending them the new LPA. 19 There would be no reason to 20 confuse an investor by sending him an 21 offering memorandum that he neither 22 wanted, nor sought, nor needs; true? 23 A. No. I think we would have sent 24 them an offering memorandum if that had 25 been the advice of our counsel.</p>	<p style="text-align: center;">REDACTED</p>

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Exhibit 90

C O N F I D E N T I A L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Adv.Pro.No.
08-01789(BRL)

Debtor.

-----x
IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

Plaintiff,

Adv.Pro.No.
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.
-----x

DEPOSITION of MICHAEL J. ACHILARRE as
taken by and before NANCY C. BENDISH, Certified
Court Reporter, RMR, CRR and Notary Public of the
States of New York and New Jersey, at the offices of
Baker & Hostetler, 45 Rockefeller Plaza, New York,
New York on Tuesday, August 9, 2011, commencing at
10:00 a.m.

<p style="text-align: right;">Page 30</p> <p>1 A. The back office would be the 2 accounting staff which would be headed by Mike 3 Autera and then myself, Ralph Sanchez and Steven 4 Asking. That's the back office. 5 Q. And so Cohanzick, if they had trade 6 tickets if they traded on a particular day, are they 7 physical pieces of paper trade tickets or are they 8 electronic? 9 A. Physical. 10 Q. And so how would they arrive at your 11 office? 12 A. They would walk them into our office 13 at the end of the day. 14 Q. And they did that every day? 15 A. Every day that they traded. 16 Q. Did they trade every day? 17 A. Pretty much every day, yeah. 18 Q. What would you do with the tickets 19 once you had them? 20 A. When you say you, it's not me 21 specifically. 22 Q. Sure. Okay. 23 A. The back office, it depends -- that 24 was typically Ralph Sanchez's role. Other people 25 could have done it on a given day should Ralph not</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. Do you know why? 2 A. They're responsible for the trading. 3 They have authority to trade on behalf of the funds 4 that they manage money for and they are in charge of 5 keeping the tickets. They're in charge of the 6 portfolios. So they have their own back office 7 services for the money that they manage for us. 8 Q. All right. And then what about 9 Madoff trade confirmations? 10 A. We would receive those by mail. 11 Q. And how often would you receive 12 those? 13 A. Madoff traded -- did not trade as 14 frequently as the in-house investment, David 15 Sherman, so we would not know when we'd be getting 16 tickets. They would arrive by mail and that's when 17 we would know that trades were done. When I say we, 18 I mean the back office. 19 Q. Sure, okay. So, the back office 20 would receive the trade tickets? 21 A. Um-hum. 22 Q. And then what protocol would you 23 follow? 24 A. We would then -- and this was Ralph 25 Sanchez's job typically. He would receive the trade</p>
<p style="text-align: right;">Page 31</p> <p>1 be there. 2 Q. Okay. 3 A. He would get the tickets from the 4 trader, he would book the trades into our internal 5 portfolio management system. We then were able to 6 take those trades and upload them to our prime 7 broker, Morgan Stanley, to assist in settling the 8 trades. 9 Q. When you had the trade tickets, then 10 you put them into your portfolio management system, 11 did the portfolio management system ever check the 12 price? 13 A. No, it did not have that capability. 14 Q. What about when it was uploaded to 15 Morgan Stanley, could they determine whether the 16 prices were accurate? 17 A. Yes. 18 Q. What about trade tickets for 19 Cerberus, did you receive those? 20 A. No. Those were all kept at Cerberus. 21 Q. So on a daily basis if they made 22 trades, you would not receive the tickets? 23 A. That's correct, would not. 24 Q. Would you ever receive the tickets? 25 A. No.</p>	<p style="text-align: right;">Page 33</p> <p>1 tickets and then he would then take the tickets 2 manually and put them into our portfolio management 3 system. 4 Q. Okay. 5 A. And then reconcile to make sure that 6 everything was booked correctly. 7 Q. So when you described Cohanzick 8 before, you said you would upload them to JPMorgan 9 for settlement? 10 A. Um-hum. 11 Q. So you would not do that for Madoff? 12 A. No. 13 Q. And that is because? 14 A. They were settling -- my 15 understanding, they were settling through Madoff. 16 Q. So they were already settled? 17 A. They were already -- the trades were 18 settled. 19 Q. All right. So you said you received 20 Cohanzick trade tickets on the same day as the 21 trades were made? 22 A. Yes. 23 Q. What about for Madoff? 24 A. Madoff would take a couple days in 25 that we got them by mail. They weren't in a space</p>

Page 34	Page 36
<p>1 where they could walk over the tickets. They mailed 2 them to us. 3 Q. Was it usually just a couple days or 4 did you ever have to wait for trade tickets for 5 Madoff? 6 A. What's a couple? It was more than 7 one or two, but it wasn't weeks. 8 Q. What about monthly statements? Did 9 you receive monthly statements from Cohanzick? 10 A. No. Cohanzick managed money for us. 11 They wouldn't provide monthly statements. They 12 weren't a broker. 13 Q. Is it the same for Cerberus? 14 A. Once again, they're not the broker, 15 so they don't provide us monthly statements. Well, 16 Cerberus provides us our books monthly, but it's not 17 statements -- I think what you're asking about is 18 broker statements. 19 Q. Right. 20 A. That's not a role that Cohanzick or 21 Cerberus would provide. 22 Q. So you did receive monthly statements 23 from Madoff? 24 A. Yes. 25 Q. Because he was the broker and he</p>	<p>1 ours, we received broker statements. 2 Q. Okay. Did you think it was unusual 3 that Madoff did the trades and was the broker, as 4 opposed to Cohanzick? 5 A. No. 6 Q. That didn't strike you as unusual? 7 A. No. 8 Q. Did you do anything to confirm that 9 the trade tickets were accurate in terms of the 10 price at which the stock was sold? 11 MR. WHITE: When you say "you," you 12 mean -- 13 MS. HARTMAN: I mean the back office. 14 A. No. 15 Q. No? 16 A. No. 17 Q. You just took the trade ticket -- you 18 meaning Gabriel Corporation Capital took the tickets 19 at face value, you didn't check the values that were 20 listed on the trade tickets? 21 A. Well, in order for a trade to settle, 22 the price would need to be right for our in-house 23 portfolio managed by David Sherman. So we would 24 upload the security to Morgan Stanley and if the 25 trade didn't match the other side of that, the trade</p>
Page 35	Page 37
<p>1 managed the funds; is that correct? How did that 2 work? 3 A. He managed the funds and there was 4 a -- Bernard L. Madoff Securities was the brokerage 5 firm, as I understand it. 6 Q. Okay. 7 A. I want to clarify, you're not really 8 asking the question -- I think I know what you want 9 to ask. I know you said don't think. 10 Q. Sure, no. I appreciate it. 11 A. Cohanzick would manage money for us 12 and they employed Morgan Stanley as their prime 13 broker. So when we uploaded the trades, Morgan 14 Stanley was the broker for that portfolio. We would 15 receive broker statements from them on a monthly 16 basis. 17 Q. Okay. 18 A. Bernard Madoff firm also managed 19 money for us. 20 Q. So you would receive monthly 21 statements from JPMorgan? 22 A. From Morgan Stanley. 23 Q. From Morgan Stanley, okay. All 24 right, I've got that. Then for Madoff? 25 A. Once again, they're another broker of</p>	<p>1 would, what you call, break, so it wouldn't settle. 2 Q. How often would trades break? 3 A. Not very often. 4 Q. And what would happen when the trade 5 broke? 6 A. We'd just be notified that what you 7 reported to us is not what the other side of that 8 transaction reported to us. 9 Q. Okay. So when you received the trade 10 tickets from Madoff, my understanding is that the 11 trades were already settled. Did you ever check the 12 prices on those trade tickets against the market? 13 A. No. Not that I'm aware of. I 14 didn't. 15 Q. Would anyone in the office be -- 16 A. Not that I'm aware of. It would be a 17 very -- seems to be something that would not 18 typically be done. 19 Q. Was there any difference in 20 monitoring Ascot compared to Gabriel and Ariel, from 21 an accounting perspective, from your department's 22 perspective? 23 A. No. 24 Q. You treated it the same in terms of 25 your accountings and your monthly reports?</p>

Page 42	Page 44
<p>1 (Exhibit Achilarre-1 marked for 2 identification.) 3 Q. Have you had a chance to look at it? 4 A. Yes. 5 Q. Could you just tell me what this is. 6 A. This is an email from Mike Autera to 7 me. 8 Q. Okay. 9 A. And this is providing me with the 10 information I needed to come up with our monthly 11 estimate. So this information allowed me to 12 determine the monthly P & L for our Madoff 13 investments. 14 Q. And so you received this information 15 from Mike Autera before you received the statements 16 from Madoff? 17 A. Yes. This information would go -- 18 this would come from Madoff to Mike and then Mike 19 Autera would forward it to me to do what I needed to 20 do, and then I would take the broker statements that 21 I got and make sure that they tied back to the 22 values that were given to me on the second, 23 typically the second business day of the month. 24 Q. Where was Mr. Autera getting his 25 numbers?</p>	<p>1 these numbers represent a .8 MTD increase," what 2 does that mean? Month to date? 3 A. That means when I calculate the P & L 4 using these numbers, there should be a .8 percent 5 month-to-date performance. 6 Q. Would that be the same for Ascot as 7 well? 8 A. They should be similar, yes. 9 Q. So, did Gabriel and Ariel have the 10 same positions as Ascot? 11 A. I don't know for sure, but I believe 12 they did. 13 Q. So you think -- were the portfolios 14 identical? 15 A. The positions I believe were very 16 similar. 17 Q. So across the three funds they were 18 similar? 19 A. Yes. 20 Q. So there wasn't a different strategy 21 employed? 22 A. No. No. 23 Q. I want to introduce Achilarre exhibit 24 number 2. 25 (Exhibit Achilarre-2 marked for</p>
Page 43	Page 45
<p>1 A. This was an email provided by someone 2 at Madoff. 3 Q. So he called or he emailed someone? 4 A. I don't know. I just know that he 5 would forward me the -- take a step back. I don't 6 know how exactly he got these numbers, if it was a 7 phone call or if it was email. Mike would send me 8 that information. 9 Q. Would he send it to you on a monthly 10 basis? 11 A. Yes. I would get this every month. 12 Q. But, again, you don't know where he 13 received -- 14 A. I know he got it from Madoff. I just 15 don't know in what capacity. 16 Q. Whether it was email or telephone? 17 A. Or telephone, right. 18 Q. Do you know who he dealt with at 19 Madoff? 20 A. My understanding is that he dealt 21 with someone by the name of Frank DiPascali. 22 Q. Is that the only person he dealt 23 with? 24 A. That's the only name that I remember. 25 Q. And when it says here, "They said</p>	<p>1 identification.) 2 Q. Again, this is a similar email. 3 A. Um-hum. 4 Q. And this time you respond. 5 A. That's correct. 6 Q. And you say, "These numbers have been 7 confirmed by the broker statements we received 8 today." 9 A. That's right. 10 Q. So, my understanding of this process 11 is Mr. Autera would receive numbers from someone at 12 BLMIS and then you would compare them? 13 A. That's right. I basically am telling 14 Mike that information that they provided to us on 15 the second business day ties to the actual broker 16 statements which we received. And that would have 17 been on the 5th. 18 Q. I know that there are many months in 19 a year, you've worked there from 2004 for four years 20 on a monthly basis. Did the numbers generally tie? 21 A. Yes, absolutely. 22 Q. Really? Okay. Well, why wouldn't 23 Ariel or Gabriel have dividends if Ascot has 24 dividends? 25 A. Ariel and Gabriel would have had</p>

<p style="text-align: right;">Page 50</p> <p>1 would have been my thought and that's why I asked 2 Mike to double-check. 3 Q. Did the dividend misreporting happen 4 frequently? 5 A. As I said before, I recalled the one 6 time and maybe it was two times, but this was not a 7 frequent occurrence. 8 Q. But could there have been another 9 time, you just don't remember? 10 A. Could have been, but pretty unlikely. 11 The statements that -- the numbers that we received 12 on the second business day, from what I can 13 remember, virtually always tied to the statements 14 that we would then receive a couple days after that. 15 Q. So you're saying the numbers that 16 Mr. Autera gave you most of the time corresponded to 17 the statements -- 18 A. The actual broker statement. 19 Q. So you were never put on notice that 20 the numbers are funny or they don't match? 21 A. No. 22 Q. Based on Mr. Autera's email? 23 A. No. 24 MS. HARTMAN: I'd like to introduce 25 Exhibit 5.</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. He would ask you to make sure 2 redemptions hit or that money transfers hit? 3 A. Cohanzick and Madoff are two totally 4 different things. But Mike would ask me to, any 5 time we would be wiring money out of our funds or 6 expected to receive money into our funds in any 7 capacity, Mike would ask me to double-check. And I 8 would double-check anyway. 9 Q. Okay. Do you know, in this 10 particular instance, 2005, if positions were 11 liquidated, how would you have the \$25 million 12 transferred? Was something redeemed? Where would 13 that money be coming from? 14 A. Positions would need to be 15 liquidated. 16 Q. And would you have any role in making 17 those decisions? 18 A. No. 19 Q. Who would have that role? 20 A. That would be Bernard Madoff's 21 company. They managed the money. 22 Q. But somebody at Gabriel Capital 23 Corporation must have asked for \$25 million? 24 A. Right. 25 Q. Based on -- did they instruct which</p>
<p style="text-align: right;">Page 51</p> <p>1 (Exhibit Achilarre-5 marked for 2 identification.) 3 Q. What's going on here in this email? 4 A. This is an email, Mike says, "We 5 should receive 25 million into Ascot Partners," and 6 then an account number from Madoff. That means we 7 instructed Madoff to -- we checked them for 8 redemption requests. We asked for \$25 million. 9 Q. And who would have done that? 10 A. Mike Autera would have done that. I 11 was responsible for checking the daily activity in 12 all our brokerage accounts. This is around 13 Christmastime, so Mike was probably not in the 14 office, just asked me if I could let him know if 15 they did indeed send us the money we requested. 16 Q. Did the money hit? Do you remember? 17 A. The money hit. We never had any 18 issues with pulling money out of these accounts. 19 Q. So when Mr. Autera said check to let 20 me know if the money hit, the money usually hit from 21 Ascot or Gabriel or Ariel in Madoff? 22 A. Yes, correct. 23 Q. Did he ask you to do that for the 24 other funds, like Cohanzick? 25 A. Yes.</p>	<p style="text-align: right;">Page 53</p> <p>1 positions to liquidate in order to get the 25 2 million? 3 A. Bernard Madoff is an account that we 4 had that managed money on our behalf. 5 Q. Sure. 6 A. Like any other account that you have, 7 you can ask for money back. 8 Q. Sure. 9 A. I don't believe anyone would tell the 10 money manager what positions to sell, but that's not 11 my role. All I know is we asked for \$25 million and 12 we got \$25 million. That's really how I see it. 13 Q. Okay. Because your understanding is 14 that he directed the fund -- Bernard Madoff directed 15 the fund, so if you needed money, you would ask for 16 money, you wouldn't instruct which positions he 17 should liquidate? 18 A. Right. 19 Q. Okay. I'd like to introduce Exhibit 20 Achilarre 6. 21 (Exhibit Achilarre-6 marked for 22 identification.) 23 Q. What is this email about? 24 A. There's not a lot written here, so... 25 MS. STROKER: There is no Bates stamp</p>

<p style="text-align: right;">Page 58</p> <p>1 this document, my understanding is you think he's 2 putting together some performance summary? 3 A. I remember Lisa working on some sort 4 of performance package, whatever you want to call 5 it, a performance summary for all of our 6 investments. 7 Q. Okay. 8 A. David was assisting. As I said, 9 David was -- he played many roles, we all play many 10 roles in a small office. 11 Q. And Lisa worked for David? 12 A. Lisa was a Gabriel assistant. 13 Q. Okay. Got it, thanks. 14 MS. HARTMAN: Okay. I'd like to 15 Exhibit 7. 16 MR. WHITE: Why don't we take a 17 break. 18 (Recess taken 11:03-11:12 a.m.) 19 BY MS. HARTMAN: 20 Q. Let's start again. 21 You explained to me about the broker 22 system versus just the fund managers, but 23 essentially when Madoff purchased a stock, he 24 retained custody of it? 25 A. That's my understanding.</p>	<p style="text-align: right;">Page 60</p> <p>1 MR. WHITE: Objection. It's been 2 asked and answered. 3 Q. You can still answer. 4 A. No. 5 Q. At Eisner did the funds use 6 third-party custodians generally? 7 MR. WHITE: You mean Eisner's 8 clients? 9 MS. HARTMAN: Yes. 10 A. The funds that I worked on would 11 typically have a structure similar to the David 12 Sherman portfolios at Gabriel. They would have a 13 portfolio manager who would then use a prime broker. 14 Q. Okay. Do you know how the fund 15 managers, Cerberus and Cohanzick, were compensated? 16 A. They were paid a management fee. 17 Q. And what was the management fee for 18 Cerberus? 19 A. One percent of the assets that they 20 managed for us. 21 Q. And what about Cohanzick? 22 A. I believe it is also one percent -- 23 they are paid a percentage of the assets that they 24 manage. I'm not sure of the exact number. 25 Q. What about Madoff, how was he</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. Did anyone at Gabriel Capital discuss 2 Madoff's failure to use a third-party custodian? 3 A. I never heard that. 4 Q. Did you ever think it was odd? 5 A. I can't say I thought it was odd. I 6 don't recall seeing it in my other funds, but I only 7 work for -- I've only seen a small number of funds 8 over the years. 9 Q. What about at Eisner, did you deal 10 with third-party custodians at Eisner? 11 A. The funds had prime brokers. 12 Q. So all the funds at Eisner had prime 13 brokers? 14 A. From what I can remember. 15 Q. And so then Madoff was the only one 16 who didn't have -- who was a broker himself? 17 MS. STROKER: Objection. 18 MS. HARTMAN: I'll rephrase the 19 question. 20 Q. So at Eisner you dealt with 21 custodians? Or all the funds had custodians? 22 MR. WHITE: Objection. Rephrase the 23 question so it's one question. 24 Q. So Madoff's failure to use a 25 third-party custodian was not notable to you?</p>	<p style="text-align: right;">Page 61</p> <p>1 compensated? 2 A. We did not pay a management fee to 3 Madoff. From what I understand, the money was made 4 through commissions, but we did not pay a fee. 5 Q. Did you think that was unusual? 6 A. It was new to me. I did not think it 7 was unusual. 8 Q. Did you ever discuss it with Autera? 9 A. No. 10 Q. Did you ever discuss Madoff's failure 11 to use a third-party custodian with Autera? 12 A. No. 13 Q. Did you ever discuss it with 14 Mr. Sanchez? 15 A. No. 16 Q. Mr. Askling? 17 A. No. 18 Q. Did anyone -- so you thought that 19 Madoff was compensated through trade commissions? 20 How did you think Madoff made -- 21 A. It's not really -- 22 MR. WHITE: Let her finish the 23 question. 24 Q. So for managing his fund, how do you 25 think -- while you were working pre-arrest did you</p>

<p style="text-align: right;">Page 86</p> <p>1 typical then for an auditor to determine whether a 2 stock is overvalued or undervalued? 3 A. Yes. They have a whole valuation 4 team that will look at the processes that a fund 5 uses to determine the value of a position. 6 Q. Okay. And the auditors did that for 7 all four of your funds? 8 A. Yes. 9 MS. HARTMAN: Let's introduce Exhibit 10 13. 11 (Exhibit Achilarre-13 marked for 12 identification.) 13 Q. Is this a document that you might 14 have prepared yourself? 15 A. Part of it, maybe. I don't recognize 16 this, I'll say first off. It's an income statement 17 analytical, so I would think this is another 18 internal BDO report. The numbers that are on here 19 would have been taken off of a schedule that I would 20 have provided them with, but I don't remember doing 21 this report. 22 Q. Do you have an understanding as to 23 why the figures are in parentheses? Because my 24 understanding of accounting procedures is that 25 parentheses mean a negative value.</p>	<p style="text-align: right;">Page 88</p> <p>1 A. That's correct. 2 Q. Would the auditors when they finished 3 their work give a report to you? Would they produce 4 a report to you? 5 A. Well, the financials they come up 6 with, they sign off on our financial statements. 7 Audited financial statements are a report that comes 8 from the auditor. They're reviewing our work and we 9 take responsibility for the numbers, but the report 10 that's generated at the end of an audit is the 11 report of the auditor's set of financial statements 12 that are then sent to investors. 13 Q. I want to turn back now to Madoff and 14 your sense of the work that he performed. While you 15 were at Gabriel Capital, did anyone in the office, 16 including you, ever discuss the size of BLMIS? 17 MS. STROKER: Anyone in his office? 18 MR. WHITE: Objection. What do you 19 mean the size? 20 Q. The size, how many investors BLMIS 21 had. 22 A. No. 23 Q. Were you aware that he had -- were 24 you aware that Madoff had over a billion dollars 25 from Merkin?</p>
<p style="text-align: right;">Page 87</p> <p>1 A. No, that's actually incorrect. A 2 negative income number is a gain. So if you receive 3 cash and a dividend, you would debit cash, positive, 4 credit income, negative. So I would read this as -- 5 it says rep and then says rep 12/05. I don't know 6 what the first column is. I would venture to say 7 that based on what I'm reading here, where it says 8 rep 12/05, that's our 2005 P & L. 9 I just unfortunately can't give you 10 much detail as to what this is. It could be similar 11 to one of the exhibits you presented before when 12 they analyzed the income statement where I had spoke 13 about how the dividend was higher in one year 14 previous to the other, because we were in the common 15 stock for a longer period of time. This is probably 16 something similar to that. 17 Q. Okay. But just to be clear, you 18 prepared the first exhibit that you were talking 19 about? 20 A. Yes. 21 MS. STROKER: Which exhibit is that? 22 MS. HARTMAN: Exhibit 7. 23 A. Correct. 24 Q. But you don't know who prepared 25 Exhibit 13?</p>	<p style="text-align: right;">Page 89</p> <p>1 A. Well, I was aware that Ascot Partners 2 had a billion dollars there and that's a Merkin 3 entity. So I guess the answer to that question 4 would be yes, but I can only speak on the funds that 5 were controlled by Ezra Merkin. 6 Q. Okay. Was there any discussion ever 7 internally, whether it be you or if you heard 8 somebody else discuss or express concern over the 9 fact Ascot had 100 percent of its assets in Madoff? 10 A. I never heard any concern over that. 11 Q. Never? 12 A. No. 13 Q. Did you personally as an accountant 14 think it was unusual that all of the funds were 15 concentrated in Ascot? 16 A. No. 17 MS. STROKER: Objection. 18 Q. Were you aware of Madoff's reputation 19 in the industry? 20 A. Not really, no. 21 Q. Did you ever discuss his option 22 strategy? 23 A. No. 24 Q. Did you ever compare him or his 25 performance to Cohanzick or Cerberus?</p>

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<p>1 A. I noticed it, just because I prepared 2 the performance, but I never took the time and 3 analyzed his performance versus anyone else. 4 Q. What were your observations? 5 A. My observations were kind of like I 6 said before. The years 2004 leading up to the third 7 and fourth quarter of 2008, all of our investments 8 were generally up. I noticed that Madoff had good 9 returns, but nothing more than that. 10 Q. Were they steady returns? 11 A. They seemed to be steady returns. 12 Q. Were you ever concerned about the 13 fact that Madoff did not give his investors 14 electronic access? 15 A. That did not concern me. 16 Q. Did you ever try to obtain electronic 17 access from Madoff? 18 A. I did early in my time at Gabriel. I 19 was trying to automate things a little bit better, 20 something I thought I could help with when I got 21 there. I asked Mike Autera if we could get online 22 access and I don't remember what the exact answer 23 was, but I do remember him saying, if you want to 24 call or Ralph can call over and see if we can get 25 it. I don't remember what happened. Bottom line is</p>	<p>1 said you were never concerned about the custodian 2 issue? 3 A. I was not. It's just not my role. 4 Q. Did you discuss it with Autera at 5 all? 6 A. No. 7 Q. Did you discuss it with Ralph? 8 A. No. 9 Q. It seems as if you understood fairly 10 well that in and out strategy in the market, the 11 variance analysis that we talked about before, that 12 he was in the market part of the time and then he 13 left the market. 14 MR. WHITE: I'm sorry, ask your 15 question. 16 Q. Did you ever discuss that strategy 17 with anyone? 18 MR. WHITE: Let me just object to the 19 characterization that you added in the beginning 20 that he understood something fairly well. 21 MS. HARTMAN: Okay. 22 A. Right. 23 Q. You had an understanding of Madoff's 24 strategy; is that correct? 25 A. I saw what Madoff did. I saw the</p>
Page 91	Page 93
<p>1 we did not have electronic access. I was under 2 the -- I was under the assumption that it was not 3 available. No one told me that directly, but we did 4 not have electronic access for that account. 5 Q. Did you or Ralph ever discuss the 6 lack of electronic access? 7 A. I do believe I asked Ralph if he had 8 asked them and from what I can recall that's why I 9 came to the conclusion that it was not available. I 10 think Ralph was the one that told me it was not 11 available. 12 Q. Did you ever have a sense that 13 eventually Madoff might have electronic access? 14 A. No. 15 Q. Were you ever concerned about any 16 errors in the monthly statements from BLMIS? 17 A. No. 18 Q. Were you ever concerned about trades 19 on the Madoff statements that were conducted outside 20 the daily range for stocks? 21 A. No. 22 Q. Were you ever concerned about the 23 consistency of the return? 24 A. No. 25 Q. I believe I asked you before, but you</p>	<p>1 trades that he did. I knew what he traded. 2 Q. Okay. 3 A. I don't know how he came up with the 4 idea of what day to buy this or sell that. So I 5 wouldn't say I was an expert in his strategy. I was 6 aware of the types of instruments he was trading. 7 Q. Did you ever see any articles in the 8 newspaper, the financial press like Barron's, 9 discussing Bernie Madoff? 10 A. Not prior to December 2008. 11 Q. Did you ever hear the term 12 "front-running" in connection with Bernie Madoff? 13 A. No. Not prior to 2008. 14 Q. Did you ever hear the phrase "cherry 15 picking" in connection with -- 16 A. No. 17 MS. HARTMAN: I'd like to now mark 18 Exhibit 12 -- I'm sorry. It's 14. We're up to 14. 19 (Exhibit Achilarre-14 marked for 20 identification.) 21 Q. This is a daily P & L statement; is 22 that correct? 23 A. The first page is a daily P & L 24 statement. 25 Q. In the second page --</p>

<p style="text-align: right;">Page 94</p> <p>1 A. The subsequent pages are the 2 month-end broker statement for Ariel's portfolio at 3 Madoff. 4 Q. Let's focus on the first page. Who 5 would generate this information? 6 A. This is a report that comes directly 7 out of our portfolio management system. And Ralph 8 Sanchez would have printed this. 9 Q. On a daily basis? 10 A. Yes. 11 Q. And the check marks mean what? 12 A. The check marks mean he reconciled 13 our portfolio to the portfolio provided below, 14 beneath. 15 Q. This is something that he did on a 16 daily basis. Would he print out a daily P & L, like 17 say October 30th, 2008? Or is it just an end of the 18 month? 19 A. Clarity. The top report is a daily 20 report. 21 Q. Okay. 22 A. This report below, the Madoff report 23 is a monthly report. So this is the month-end 24 broker statement. We get this once a month. 25 Q. Right.</p>	<p style="text-align: right;">Page 96</p> <p>1 A. MFA is the fund identifier in our 2 system. So if he wanted to run a report for the 3 Madoff Ariel portfolio, he would have to tell our 4 system to run the MFA report. So just an identifier 5 for the fund. 6 Q. The numbers are values on this sheet. 7 They were never checked against realtime Bloomberg 8 figures; is that correct? 9 A. That's correct. 10 Q. So you were checking what Madoff gave 11 you against your internal account -- 12 MS. STROKER: Objection. 13 MR. WHITE: Just clarify again who 14 you mean by "you." 15 Q. One, Gabriel Capital. 16 A. The back office, the accounting 17 group? 18 Q. Yes. You would check, you meaning 19 Mr. Sanchez, would check Madoff's statements against 20 Gabriel Capital's accounting records? 21 A. That's correct. 22 Q. So you never -- so Gabriel Capital 23 never went outside its own records or Madoff's 24 records to check the value of the stocks? 25 A. No, that's not true. The value of</p>
<p style="text-align: right;">Page 95</p> <p>1 A. The report above it is a daily report 2 that was printed daily. 3 Q. So perhaps they're just together in 4 Bates ranges and that's why I stapled them. 5 A. Well, I think they're together 6 because the reconciliation is done once a month and 7 that's done from the broker's statement to the 8 report above it. 9 Q. Okay. Let's go to page 2. And I 10 understand that Mr. Sanchez did this, not you, but 11 he's checking the dates, October 1st there's a check 12 mark. 13 A. Yes. 14 Q. What is he checking that against? A 15 trade ticket? 16 A. Yes. 17 Q. So he would have the trade ticket for 18 October 10th and he would check it to Baxter 19 International; is that correct? 20 A. Right. The tick mark is probably 21 ticking that what we have in our system ties to 22 this. He booked a Baxter dividend in our system for 23 10/1, it's on 10/1 here and he's just checking his 24 work. 25 Q. What does MFA mean?</p>	<p style="text-align: right;">Page 97</p> <p>1 the stocks is the market price. That would come 2 from Bloomberg. 3 Q. It would? 4 A. The market price for a held position, 5 yes. So, for instance, at this month end they're 6 holding treasury bills, so we would verify the 7 price, I'm not sure what treasury bills, but the 8 price where you see price column, I believe that 9 does come out of Bloomberg. The price on the top 10 page. 11 Q. Oh, okay. 12 A. So price, that comes from Bloomberg. 13 And then that would tie to the statement. 14 Q. Okay. 15 MR. WHITE: Are you referring to the 16 column that says "cost"? 17 THE WITNESS: I'm referring to the 18 price. So price per share. 19 Q. So price per share would be generated 20 from Bloomberg. 21 A. Right. And then it would tie to the 22 statement behind. 23 Q. And from your work in the back office 24 did you ever hear Mr. Sanchez say, oh, these numbers 25 aren't making sense or, oh, this doesn't tie?</p>

25 (Pages 94 to 97)

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<p>1 A. No.</p> <p>2 Q. He never complained about the Madoff</p> <p>3 statements?</p> <p>4 A. No.</p> <p>5 Q. Did Mr. Autera ever complain about</p> <p>6 the Madoff statements?</p> <p>7 A. No.</p> <p>8 Q. So no one in the back office thought</p> <p>9 there was anything amiss with Madoff's statements?</p> <p>10 A. That's correct.</p> <p>11 MS. HARTMAN: Left's mark as Exhibit</p> <p>12 15.</p> <p>13 A. If I could just clarify, I think</p> <p>14 before you said never. I don't like to use the word</p> <p>15 "never."</p> <p>16 Q. Sure.</p> <p>17 A. In any back office, errors do arise</p> <p>18 at times, but there were no general instances of</p> <p>19 anyone having any questions over the Madoff</p> <p>20 statements, in general. There were specific</p> <p>21 instances, maybe, of like the dividend issue you</p> <p>22 brought up before.</p> <p>23 Q. Okay.</p> <p>24 A. But there were no general concerns.</p> <p>25 Q. Can you recall any other specific</p>	<p>1 A. That means these treasuries listed</p> <p>2 were held by one of these accounts. So this is a</p> <p>3 report that's showing all of the Madoff investments.</p> <p>4 It could be that all five were invested in all of</p> <p>5 these, but I can't say for sure. If you want to</p> <p>6 take an example, just the very first line item, the</p> <p>7 US Treasury bill, that's the total amount between</p> <p>8 those five funds for that T-bill.</p> <p>9 Q. Okay. So collectively that's how</p> <p>10 much --</p> <p>11 A. Collectively, exactly.</p> <p>12 Q. And then at one point you would</p> <p>13 allocate, at a later point on another report you</p> <p>14 would allocate the profits?</p> <p>15 A. Exactly. Exhibit 14 is just the</p> <p>16 Ariel piece. So it's the same report but Exhibit 14</p> <p>17 showing just the Ariel piece, while Exhibit 15 is</p> <p>18 showing all the Madoffs together.</p> <p>19 Q. Okay. And these numbers, could you</p> <p>20 tell me the open price, are those numbers that you</p> <p>21 received from Bloomberg?</p> <p>22 A. No. The column "Open" and the column</p> <p>23 "Close," that's quantity. So that's the shares that</p> <p>24 we had in each of these investments, and that would</p> <p>25 come from the activity that we received from Madoff.</p>
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<p>1 concerns?</p> <p>2 A. I can't, and that's what I was</p> <p>3 answering before when you asked about -- I think you</p> <p>4 used the word "never." So I just wanted to clarify.</p> <p>5 I don't like to give a yes or no for a question,</p> <p>6 never.</p> <p>7 (Exhibit Achilarre-15 marked for</p> <p>8 identification.)</p> <p>9 Q. This is Exhibit 15. This is another</p> <p>10 daily P & L. I wasn't sure what this notation at</p> <p>11 the bottom that said "actual 1,470,245" meant in</p> <p>12 comparison with the monthly P & L. What does it</p> <p>13 mean by actual down there? Do you know whose</p> <p>14 handwriting -- I asked you a series of questions, so</p> <p>15 I'm sorry. Do you know what the actual means there?</p> <p>16 A. I don't.</p> <p>17 Q. Do you know whose handwriting that</p> <p>18 might be?</p> <p>19 A. I don't know. It's not mine.</p> <p>20 Q. I look up above and it says "Madoff -</p> <p>21 Ascot Fund, Madoff - Ascot Partners, Madoff - Ariel</p> <p>22 Fund, Madoff - Gabriel Capital, LP."</p> <p>23 A. Um-hum.</p> <p>24 Q. Does that mean all those entities</p> <p>25 were invested in these treasuries?</p>	<p>1 So all the buys and sells would equal the closing</p> <p>2 quantity. The price would come from Bloomberg.</p> <p>3 Q. Where would the market value come</p> <p>4 from?</p> <p>5 A. That's just close times price.</p> <p>6 Q. Let me back up. Did you say close is</p> <p>7 from Madoff?</p> <p>8 A. Close is the -- yes, took all the</p> <p>9 trades that Madoff did in that security, you get</p> <p>10 your closing quantity.</p> <p>11 Q. Okay. Did the back office ever</p> <p>12 encounter an instance where the market value was off</p> <p>13 on the Madoff numbers?</p> <p>14 MS. STROKER: Objection.</p> <p>15 A. That's a little bit of a hard</p> <p>16 question, because we were taking the price from</p> <p>17 Bloomberg at month-end here or on a daily basis. We</p> <p>18 would get a month-end from Madoff. Our prices</p> <p>19 should match. And if they didn't, that would be a</p> <p>20 reason for something to be off. I can't recall if</p> <p>21 there was a time when a price differed from</p> <p>22 Bloomberg to Madoff at a month-end.</p> <p>23 MS. HARTMAN: Exhibit 16.</p> <p>24 (Exhibit Achilarre-16 marked for</p> <p>25 identification.)</p>

<p style="text-align: right;">Page 114</p> <p>1 business relationship with Mr. Merkin. We talked 2 but it was typically just friendly chatter. Should 3 Mike Autera not be in the office for vacation, and 4 Ezra needed something, he would come to me. But it 5 was not regular, we didn't meet on a regular basis. 6 Q. Could you give me one example of 7 something Mr. Merkin might have asked you about in 8 Mr. Autera's absence. 9 A. He could ask me for a portfolio, can 10 you run me this portfolio, the value of an 11 investor's capital account. Along those lines. 12 Q. Do you know if Mr. Merkin had access 13 to the PMS system? 14 A. I can't say for sure. He may have. 15 Q. Did Mr. Autera have access to the PMS 16 system? 17 A. Yes. 18 Q. And Mr. Sanchez? 19 A. Yes. 20 Q. And Mr. Asklings? 21 A. Yes. 22 Q. Anyone else? 23 A. No. That would be it. 24 Q. All right. And when did you learn 25 about Madoff's arrest?</p>	<p style="text-align: right;">Page 116</p> <p>1 more, really, or any less work on those accounts. 2 They were confirmed by audits at year-end. 3 So, sure, when I read what people 4 call red flags, I say to myself, oh, you know, 5 that's interesting, but I to this date don't feel 6 that we did anything where we should have picked up 7 on this. 8 MS. HARTMAN: Any other questions? 9 MS. STROKER: Not at this time. 10 MR. LAFFEY: No. We'll reserve our 11 rights. 12 MS. MALASKA: Same, no questions. 13 We'll reserve our right to ask questions later. 14 THE WITNESS: I don't have any 15 questions. 16 MS. HARTMAN: Thank you very much for 17 your patience and your cooperation. We're done. 18 (Deposition concluded 1:20 p.m.) 19 -o0o- 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 115</p> <p>1 A. I saw it on TV the day of December 2 11th, 2008. 3 Q. And did Mr. Autera then have any 4 specific instructions for you? 5 MR. WHITE: In connection with the 6 recent arrest? 7 MS. HARTMAN: After the news of the 8 arrest. Thank you. 9 A. Yeah, he just simply told me if 10 investors are to contact you, that I can forward 11 them to him. 12 Q. And after reading the articles about 13 Madoff's arrest and the Ponzi scheme, is there 14 anything now in retrospect you say to yourself, oh, 15 yeah, well, that was kind of unusual in dealing with 16 him? 17 MR. WHITE: Objection. 18 MS. STROKER: Objection. 19 Q. Please answer. 20 A. I think everything that we did in 21 regards to the Madoff account was correct. We had a 22 year-end audit. To me the Madoff account was an 23 account no different than our accounts at Morgan 24 Stanley, in that it was an accredited broker. Our 25 records tied to their records. We didn't do any</p>	<p style="text-align: right;">Page 117</p> <p>1 CHANGES AND SIGNATURE 2 3 WITNESS NAME: MICHAEL J. ACHILARRE 4 PAGE/LINE CHANGE REASON 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

Exhibit 91

C O N F I D E N T I A L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Adv.Pro.No.
08-01789(BRL)

Debtor.

-----x
IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

VOLUME II

Plaintiff,

Adv.Pro.No.
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.
-----x

DEPOSITION of MICHAEL E. AUTERA, JR.,
as taken by and before NANCY C. BENDISH, Certified
Court Reporter, RMR, CRR and Notary Public of the
States of New York and New Jersey, at the offices of
BAKER & HOSTETLER, 45 Rockefeller Plaza, New York,
New York on Wednesday, October 19, 2011, commencing
at 10:32 a.m.

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<p>1 funds.</p> <p>2 Q. The calculation of fees?</p> <p>3 A. The charging of the fees to limited</p> <p>4 partners and shareholders of the two funds.</p> <p>5 Q. Was that a decision made by</p> <p>6 Mr. Merkin?</p> <p>7 A. Yes.</p> <p>8 Q. Did you have any discussions with him</p> <p>9 about that decision?</p> <p>10 A. This was in the aftermath of the</p> <p>11 Madoff announcement and in speaking with counsel --</p> <p>12 MR. ANELLO: If your conversation</p> <p>13 with Mr. Merkin resulted in him relaying information</p> <p>14 from counsel or analysis from counsel, you should</p> <p>15 avoid going into the substance of the conversation,</p> <p>16 either with counsel or Mr. Merkin, if it's based on</p> <p>17 counsel's conversation.</p> <p>18 A. I believe it was based on</p> <p>19 conversations with counsel.</p> <p>20 Q. So you don't recall any conversation</p> <p>21 with Mr. Merkin other than conversation revealing</p> <p>22 information based on discussions he had with</p> <p>23 counsel?</p> <p>24 A. Or in which I was involved that</p> <p>25 counsel was present, not that I recall.</p>	<p>1 Q. Were either Mr. Madoff or BLMIS ever</p> <p>2 referenced as a money manager in any of these</p> <p>3 documents?</p> <p>4 A. By name, not that I'm aware of.</p> <p>5 Q. Or as an investment adviser?</p> <p>6 A. Again, by name not that I'm aware of.</p> <p>7 Q. Are you aware as to how Mr. Madoff</p> <p>8 and BLMIS were compensated for the work they</p> <p>9 purportedly did on behalf of Ascot, Ariel and</p> <p>10 Gabriel?</p> <p>11 A. My understanding is that they</p> <p>12 received a trade -- a commission on the trading.</p> <p>13 Q. What was the size of that commission?</p> <p>14 A. I don't recall specifically. Four</p> <p>15 cents, five cents.</p> <p>16 Q. Do you recall if it ever changed?</p> <p>17 A. I don't know.</p> <p>18 Q. How are you aware of that?</p> <p>19 A. I believe it was as a result of</p> <p>20 conversation with Mr. Merkin.</p> <p>21 Q. Would that be information that would</p> <p>22 be available in the trade confirmations that you</p> <p>23 received, and that you or your staff reviewed?</p> <p>24 A. Some confirmations showed the</p> <p>25 commission, but many of the confirmations reflected</p>
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<p>1 Q. Tell me in layman's terms, what is a</p> <p>2 management fee?</p> <p>3 A. A management fee is a fee that's</p> <p>4 based on the level of assets managed in the fund.</p> <p>5 That's my understanding of a management fee.</p> <p>6 Q. And then the same question for</p> <p>7 incentive fee.</p> <p>8 A. An incentive fee is a fee based on a</p> <p>9 percentage of the appreciation earned in that fund.</p> <p>10 MR. KITCHEN: This would be a good</p> <p>11 time to break for five or ten minutes.</p> <p>12 MR. ANELLO: Sure.</p> <p>13 (Recess 11:38-11:48 a.m.)</p> <p>14 BY MR. KITCHEN:</p> <p>15 Q. Mr. Autera, before the break we</p> <p>16 discussed a number of, I guess one prospectus and a</p> <p>17 number of offering memoranda for the various funds</p> <p>18 that invested through BLMIS. Are you aware in any</p> <p>19 of those documents of any reference to either</p> <p>20 Mr. Madoff or to BLMIS?</p> <p>21 A. My recollection is that the Ascot</p> <p>22 offering memorandum mentioned the Madoff firm.</p> <p>23 Q. In what context?</p> <p>24 A. As being custodian or broker for</p> <p>25 Ascot.</p>	<p>1 a net price, so the confirmation was part of the</p> <p>2 price of the security sold and purchased.</p> <p>3 Q. You testified earlier that you had</p> <p>4 involvement as far as providing information for</p> <p>5 these offering memoranda and prospectus. Did you</p> <p>6 ever have discussions with Mr. Merkin as to whether</p> <p>7 or not more disclosure should be made concerning the</p> <p>8 management that was being done by BLMIS on behalf of</p> <p>9 these funds?</p> <p>10 A. Not that I recall.</p> <p>11 Q. Do you recall ever having questions</p> <p>12 by investors as to whether or not more disclosure</p> <p>13 should be made?</p> <p>14 A. Not that I recall.</p> <p>15 MR. KITCHEN: Mr. Bitman, do you have</p> <p>16 the next exhibit.</p> <p>17 (Exhibit Autera-15 marked for</p> <p>18 identification.)</p> <p>19 Q. I ask you to look over this group of</p> <p>20 documents. Tell me if you recognize them.</p> <p>21 A. Okay.</p> <p>22 Q. What is this set of documents?</p> <p>23 A. This is the subscription agreement</p> <p>24 related to my IRA's investment in Ascot Partners,</p> <p>25 LP.</p>

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<p>1 Q. In connection with that subscription, 2 do you remember submitting any other documents other 3 than those that are reflected here? 4 A. I'm not sure. 5 Q. If you look at the last page, again, 6 is that Mr. Merkin's signature on behalf of Ascot 7 Partners? 8 A. Yes, it is. 9 Q. Can you tell me who the other -- I 10 guess the other signature is a Notary. Did you fill 11 out the information on this page? 12 A. I did not. 13 Q. Who would have done that? 14 A. It would have been someone at the IRA 15 fiduciary, at Delaware Charter. 16 Q. They would have done that at your 17 instruction? 18 A. I would have asked them, I would have 19 made the decision to invest in Ascot Partners on 20 behalf of my IRA and they would have done the 21 paperwork. 22 Q. Tell me why you made the decision to 23 invest in Ascot Partners? 24 A. I don't recall specifically, but I 25 thought that Ascot was a good investment.</p>	<p>1 million. 2 MR. POWERS: Point 8 or point 4? 3 THE WITNESS: 1.8, I think. I don't 4 recall the exact amount. 5 Q. On the very first page is a 6 handwritten note -- have you had any withdrawals or 7 redemptions since Mr. Madoff's arrest? 8 A. No. 9 Q. Or distribution? 10 A. No. 11 Q. The note on the first page, I believe 12 that reads: "Client's check will be wired directly 13 to you," do you know whose handwriting that is? 14 A. I do not. 15 Q. I'd like to talk to you about the, I 16 guess the mechanics of how money actually was put in 17 when either you or another investor subscribed to 18 Ascot Partners. Was money initially placed by wire? 19 MR. ANELLO: For whom? For him or 20 others? 21 Q. How would money be placed from an 22 investor subscribing in Ascot? 23 A. An investor could either write a 24 check to Ascot Partners or could wire funds into 25 Ascot Partners.</p>
Page 111	Page 113
<p>1 Q. Do you recall if you approached 2 Mr. Merkin about that or if he approached you, or 3 some other arrangement? 4 A. I don't recall approaching him. It 5 would have been my decision. 6 Q. The acknowledgement on the last page 7 is dated December 16th, 1999. And then the 8 subscription itself, the subscription agreement is 9 marked December 15th, 1999. Do you recall if that 10 is when, there in the month of December 1999, that 11 you subscribed to Ascot Partners? 12 A. I don't believe -- my subscription I 13 believe was as of January 1st, 2000. 14 Q. Do you know what the size of that 15 subscription was? 16 A. Specifically, no. 17 Q. Do you have a general understanding? 18 A. I believe it was somewhere between 19 600 and \$700,000. That's my recollection. 20 Q. Prior to Mr. Madoff's arrest, did you 21 make any redemptions from that investment? 22 A. No. 23 Q. Do you recall what the size of the 24 investment was at the end of November 2008? 25 A. I believe it was approximately \$1.8</p>	<p>1 Q. If they wired it, where would the 2 wire go to? 3 A. For Ascot Partners it would go to 4 Ascot's brokerage account at Morgan Stanley & 5 Company. 6 Q. And a check, where would that go? 7 A. The check would come to Gabriel 8 Capital Corp. Gabriel Capital Corp. would deposit 9 it at the Morgan Stanley account. 10 Q. For the portion of Ascot that was 11 invested through BLMIS, take me through the steps of 12 how that money went from the Morgan Stanley 13 brokerage account to the custody of BLMIS. 14 A. Mr. Merkin would decide the amount 15 of -- if there was a change, he decided to make a 16 change, whether to add money to the Madoff account 17 or take money out of the Madoff account, that 18 decision would be made, and he would let me know and 19 I would send a wire request. If the money was going 20 to the Madoff account, generally I would send a 21 request to Morgan Stanley asking them to wire funds 22 to Morgan Stanley -- to Madoff. And if Madoff, if 23 we were taking money out of the Madoff account, I 24 would send instructions to the Madoff firm asking, 25 telling them -- instructing them to wire the funds</p>

<p style="text-align: right;">Page 114</p> <p>1 to Morgan Stanley.</p> <p>2 Q. The wires to and from BLMIS, do you</p> <p>3 recall where that account was? Where the money</p> <p>4 actually would have gone?</p> <p>5 A. My recollection is that Madoff</p> <p>6 Securities used a bank account at JPMorgan.</p> <p>7 Q. And within the account, turning to</p> <p>8 the Morgan Stanley brokerage account, was there any</p> <p>9 segregation of assets there for investors in Ascot</p> <p>10 versus Ariel and Gabriel, or was it all just one</p> <p>11 fund -- one account?</p> <p>12 A. I'm sorry, just ask that again,</p> <p>13 please.</p> <p>14 Q. Sure. You said for investors in</p> <p>15 Ascot that whether it was by wire or check being</p> <p>16 deposited, eventually the money ends up in a</p> <p>17 brokerage account at Morgan Stanley, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Is that also the case for investors</p> <p>20 in Ariel and Gabriel?</p> <p>21 A. Yes.</p> <p>22 Q. And specifically is it correct then</p> <p>23 that investors in Ariel and Gabriel, their money</p> <p>24 either by wire or check would find its way into the</p> <p>25 Morgan Stanley brokerage account?</p>	<p style="text-align: right;">Page 116</p> <p>1 A. Again, Mr. Merkin would decide to</p> <p>2 allocate, let's say, Ascot monies to Pzena. In the</p> <p>3 case of Pzena, there was a separate Morgan Stanley</p> <p>4 account in the name of Ascot Partners that we would</p> <p>5 wire those funds to. So we would instruct Morgan</p> <p>6 Stanley to transfer the funds from the account I</p> <p>7 mentioned before to this other account at Morgan</p> <p>8 Stanley in the name of Ascot Partners.</p> <p>9 Q. That's for Pzena. Is that also the</p> <p>10 case for Marque Millennium?</p> <p>11 A. Marque Millenium was different. That</p> <p>12 was a fund that -- that was an outside fund, so</p> <p>13 instructions would have been given to Morgan Stanley</p> <p>14 to wire the funds from the Ascot account to Marque</p> <p>15 Millenium for a subscription in that fund.</p> <p>16 Q. With regard to, limit it to the three</p> <p>17 funds we've been talking about, Ascot, Ariel and</p> <p>18 Gabriel, do you know if at any points in time</p> <p>19 Mr. Merkin gave advice to investors or prospective</p> <p>20 investors as to whether they should invest in one of</p> <p>21 those funds versus others?</p> <p>22 A. Gave advice, whether...?</p> <p>23 Q. I'll strike that.</p> <p>24 When investors first subscribed,</p> <p>25 prior to that would they have conversation with</p>
<p style="text-align: right;">Page 115</p> <p>1 A. It would be an account in the name of</p> <p>2 whichever fund it was going to. So, Ariel had its</p> <p>3 own Morgan Stanley account, Gabriel had its own</p> <p>4 Morgan Stanley account, and the two Ascots had their</p> <p>5 own.</p> <p>6 I should clarify that the offshore</p> <p>7 fund subscriptions, if someone was wiring, would</p> <p>8 have gone not to a Morgan Stanley account. It would</p> <p>9 have gone to an account at the Cayman Island</p> <p>10 registrar because those were offshore funds.</p> <p>11 Q. Do you recall who the Cayman Island</p> <p>12 registrar was?</p> <p>13 A. It varied over the course of time.</p> <p>14 It began as MeesPierson. Actually began as Pierson,</p> <p>15 Heldring & Pierson. Then MeesPierson and then</p> <p>16 Fortis was the final. They were all registrars in</p> <p>17 Cayman.</p> <p>18 Q. And then for investments or money</p> <p>19 placed for Ascot Partners, other than through BLMIS,</p> <p>20 for instance I believe that you testified last time</p> <p>21 that there were other investments at different</p> <p>22 points in time with Pzena, Marque Millennium and</p> <p>23 in-house trading. For each of those, can you tell</p> <p>24 me the mechanics of where the money would go from</p> <p>25 the Morgan Stanley brokerage account?</p>	<p style="text-align: right;">Page 117</p> <p>1 Mr. Merkin as to the different funds Mr. Merkin</p> <p>2 oversaw into which they could subscribe?</p> <p>3 A. Yes, I believe they did.</p> <p>4 Q. In those conversations would</p> <p>5 Mr. Merkin -- what advice did he provide as to why</p> <p>6 one should invest in Ascot as opposed to Ariel or</p> <p>7 Gabriel or vice versa?</p> <p>8 A. I'm not sure.</p> <p>9 Q. Did you have those conversations with</p> <p>10 him when you decided to invest in Ascot?</p> <p>11 A. No. Not that I recall.</p> <p>12 Q. Did you consider investing in Ariel</p> <p>13 or Gabriel?</p> <p>14 A. I was an investor in Gabriel as well.</p> <p>15 Q. When did you first subscribe to</p> <p>16 Gabriel?</p> <p>17 A. I don't recall the specific date. It</p> <p>18 would have been I think this time period, around</p> <p>19 2000.</p> <p>20 Q. Around the 2000 time period.</p> <p>21 A. I don't recall specifically.</p> <p>22 Q. We talked about Pzena and Marque</p> <p>23 Millenium. How much was that initial subscription</p> <p>24 in Gabriel?</p> <p>25 A. Sitting here today I just don't</p>

<p style="text-align: right;">Page 118</p> <p>1 recall.</p> <p>2 Q. Do you have a general recollection?</p> <p>3 For Ascot you said between six and 700,000. Was it</p> <p>4 somewhere around there?</p> <p>5 A. I'm not sure. I think it started as</p> <p>6 smaller subscriptions but there were subsequent</p> <p>7 subscriptions.</p> <p>8 Q. So initially started smaller than the</p> <p>9 subscription to Ascot?</p> <p>10 A. Again, I just don't recall.</p> <p>11 Q. Do you recall if you ever made</p> <p>12 withdrawals or redemptions from that investment?</p> <p>13 A. I did not.</p> <p>14 Q. Do you recall what the size of the</p> <p>15 investment was as of December 11, 2008?</p> <p>16 A. I believe it was somewhere around a</p> <p>17 million and a half dollars, I think.</p> <p>18 Q. Do you know if you received any,</p> <p>19 either by way of redemption or withdrawal or</p> <p>20 distributions, received any of those monies back</p> <p>21 since December 11, 2008?</p> <p>22 A. I have not.</p> <p>23 Q. For the portions of Ascot you</p> <p>24 testified previously there was a portion that was</p> <p>25 allocated to in-house trading.</p>	<p style="text-align: right;">Page 120</p> <p>1 Gabriel?</p> <p>2 A. Again, Gabriel would send its</p> <p>3 redemption proceeds out of its Morgan Stanley</p> <p>4 account, the account that was used to accept</p> <p>5 subscriptions in.</p> <p>6 Q. For the portions of Gabriel that were</p> <p>7 invested through BLMIS, were the mechanics the same</p> <p>8 as you testified to about Ascot as far as money</p> <p>9 being sent to BLMIS's JPMorgan account?</p> <p>10 A. Yes. If a decision was made to</p> <p>11 invest additional monies in the Madoff account, we</p> <p>12 would instruct Morgan Stanley to wire funds in, if</p> <p>13 the proceeds were -- if the amount coming was coming</p> <p>14 from excess capital at Morgan Stanley.</p> <p>15 Q. For the years 2002 through 2008, can</p> <p>16 you tell me the places where money was placed for</p> <p>17 Ariel and Gabriel other than BLMIS?</p> <p>18 A. 2002 through 2008?</p> <p>19 Q. Yes.</p> <p>20 A. There were various places. We had</p> <p>21 accounts managed by Cerberus. We had in-house</p> <p>22 trading.</p> <p>23 Q. In-house, would that be Mr. Jack</p> <p>24 Mayer?</p> <p>25 A. It would be an account that he</p>
<p style="text-align: right;">Page 119</p> <p>1 A. Yes.</p> <p>2 Q. In those events, take me through the</p> <p>3 mechanics of where the money would go, if anywhere,</p> <p>4 from the Morgan Stanley brokerage account.</p> <p>5 A. We're talking about the initial</p> <p>6 account that an investor would wire their funds</p> <p>7 into. I believe that's the account where the</p> <p>8 trading was done at Morgan Stanley.</p> <p>9 Q. So it didn't move, it was in the same</p> <p>10 account?</p> <p>11 A. It did not move.</p> <p>12 Q. When an investor decided to redeem or</p> <p>13 withdraw money as an Ascot investor, walk me through</p> <p>14 the mechanics of where that money would come from.</p> <p>15 Did it also come out of the Morgan Stanley brokerage</p> <p>16 account?</p> <p>17 A. Ascot Partners?</p> <p>18 Q. Yes.</p> <p>19 A. Redemption proceeds would come out</p> <p>20 of -- would be sent out of that account, yes.</p> <p>21 Q. Is there any other place they would</p> <p>22 be sent out of?</p> <p>23 A. For Ascot Partners, yes.</p> <p>24 Q. Is that also the case for investors</p> <p>25 in Ariel and Gabriel? I should limit it, to</p>	<p style="text-align: right;">Page 121</p> <p>1 managed, yes.</p> <p>2 Q. Cohanzick and David Sherman, were</p> <p>3 they in-house? How were they treated?</p> <p>4 A. Well, I don't know how they were</p> <p>5 treated. David Sherman had an account at Morgan</p> <p>6 Stanley that he managed on behalf of -- he had an</p> <p>7 account for Ariel and an account for Gabriel. There</p> <p>8 were Pzena accounts for both.</p> <p>9 Q. And for Mayer, it was the same as</p> <p>10 with Mr. Sherman, that there were separate accounts</p> <p>11 at Morgan Stanley for the assets entrusted to him?</p> <p>12 A. Ariel had an account and Gabriel had</p> <p>13 an account. They were separate, yes.</p> <p>14 Q. Within those accounts -- how was the</p> <p>15 accounting done as to here's the money entrusted to</p> <p>16 Mr. Mayer as opposed to here's the money entrusted</p> <p>17 to Mr. Sherman?</p> <p>18 A. How was -- I'm not sure I understand</p> <p>19 your question.</p> <p>20 Q. If Mr. Merkin decided at some point</p> <p>21 in time, I'm going to place additional monies with</p> <p>22 Cohanzick, the mechanics of the money entrusted,</p> <p>23 what would happen to it? Would it leave the Morgan</p> <p>24 Stanley brokerage account?</p> <p>25 A. It could. Generally excess cash was</p>

<p style="text-align: right;">Page 130</p> <p>1 Q. To your knowledge is this an accurate 2 representation of the levels of compensation as 3 reflected here? 4 A. I believe it is. 5 Q. Is it accurate then that when the 6 compensation drops to zero that indicates that the 7 individual has left GCC? 8 MR. ANELLO: Well, there are zeros in 9 the beginning and the end. 10 A. In the column where it says H or T, 11 those are my notes for hire or terminate. So 12 anything with a "T" was someone who left the firm, 13 anyone with an "H" was someone who came to the firm. 14 Q. The individuals you identified, 15 starting with Mr. Gordon, what was the scope of his 16 duties in connection with the work he did for you? 17 A. His work for Gabriel Capital Corp., 18 he was responsible for the management information, 19 putting -- inputting into the management information 20 system. He was responsible for doing kind of the 21 back office brokerage reconciliations and things 22 like that. 23 Q. When you say input into the 24 management system, what was he inputting? 25 A. Again, trade confirmations that would</p>	<p style="text-align: right;">Page 132</p> <p>1 things. 2 Q. Did he have any involvement in the 3 inputting of confirmations or other information in 4 the system? 5 A. He could certainly have done that, 6 but that was not his main focus. 7 Q. And then, lastly, Mr. Asking, what 8 were his duties? 9 A. Mr. Asking was much more like the 10 role of Ralph and Andrew in that he's inputting 11 information into our system and dealing with the 12 brokers from a reconciling standpoint, things like 13 that. 14 Q. Other than Messrs. Gordon, Sanchez 15 and Asking, were there any individuals you recall 16 in the period 2002 through 2008 whose duties -- who 17 had a substantial portion of their time taken up 18 with inputting information into the system, as you 19 described it? 20 A. Again, other than Mark Wiener and 21 Mike Achillarre, who certainly had access to the 22 system and could have done it, the only other person 23 would have been me. 24 Q. Do you recall having discussions with 25 any of these individuals at any point regarding</p>
<p style="text-align: right;">Page 131</p> <p>1 come in from the various places, he would input that 2 information into our management information 3 reporting system. 4 Q. Did he have any other 5 responsibilities? 6 A. He may have done some accounting 7 type, general ledger type work, but that wasn't the 8 main focus. 9 Q. Mark Wiener, what was the scope of 10 his duties under you? 11 A. Mark Wiener did some of that as well 12 but was more focused on the accounting from the 13 standpoint of the general ledger, dealing with the 14 audits and things like that. 15 Q. Ralph Sanchez? 16 A. Ralph Sanchez's role was much more 17 like Andrew Gordon's role. He was responsible for 18 inputting trades into our system and dealing with 19 kind of the brokers in the back office. 20 Q. Mr. Achillarre? 21 A. Mr. Achillarre was much more -- he was 22 similar to Mark Wiener in that he was responsible 23 more for the accounting, the general ledger, office 24 related things, human resources, things like that, 25 and then dealing with auditors and those kinds of</p>	<p style="text-align: right;">Page 133</p> <p>1 Mr. Madoff or BLMIS? 2 MR. ANELLO: Which individuals? 3 MR. KITCHEN: Messrs. Gordon, Sanchez 4 and Asking. 5 A. No. 6 MR. ANELLO: I'm sorry, was your 7 question limited to a time? 8 MR. KITCHEN: It was not. 9 Q. Do you recall having any discussion 10 with these three individuals at any point in time 11 regarding the trade confirmations that they were 12 inputting? 13 A. I don't recall any specific 14 conversations. 15 Q. Do you recall generally talking about 16 the trade confirmations with him? 17 A. Again, that was their role in 18 inputting the system, so I very well might have, but 19 I don't recall specific conversations. 20 Q. Do you recall if at any point in time 21 these individuals raised concerns regarding the 22 information displayed in the trade confirmations? 23 A. No. 24 Q. Both before and after Mr. Madoff's 25 arrest?</p>

<p style="text-align: right;">Page 134</p> <p>1 A. I don't recall any conversation. 2 Q. These individuals also input 3 information into the system taken from the monthly 4 statements provided you by BLMIS; is that correct? 5 A. They would have, yes. 6 Q. Do you recall if at any point in time 7 any of them raised concerns about the information 8 displayed in those monthly statements? 9 A. Not that I recall. 10 Q. Which individual or individuals at 11 GCC actually received the trade confirmations and 12 the monthly statements sent to GCC by BLMIS? 13 A. The mail for the firm comes into the 14 receptionist. So I guess initially the receptionist 15 would have received trade confirmations from Madoff 16 and the other brokers. 17 Q. So they were sent just generically to 18 Gabriel Capital, not to the attention of either 19 yourself or Mr. Sanchez or anyone else? 20 A. My recollection is they were 21 addressed to the fund that they related to. 22 Q. And that's correct for 2002 through 23 2008? 24 A. Yes. 25 Q. Once the receptionist received them,</p>	<p style="text-align: right;">Page 136</p> <p>1 to conduct due diligence of Mr. Madoff or BLMIS? 2 A. Again, they were used by me for those 3 purposes I just mentioned. Clearly those reports 4 were also given to Mr. Merkin -- 5 Q. I'm not asking about the purpose. 6 MR. ANELLO: He's not finished. 7 A. -- and utilized by him to review all 8 the activity of the Madoff account and all the other 9 places that money was invested. 10 Q. You mentioned an activity report. 11 What is that? 12 A. That would be a report that would 13 just show all the buys and sells, dividends, 14 interest. All the activity in a given account. 15 Q. So what was the purpose of that type 16 of report for either yourself or Mr. Merkin? 17 A. To see the activity for the fund. 18 You could see each -- it would be the detail behind 19 the profit and loss report or the position report 20 that's generated. 21 Q. You mentioned an exposure report. 22 What is that? 23 A. Well, it's not an exposure report. 24 It's exposure reporting. So the value of the 25 investments where the funds -- you know, where the</p>
<p style="text-align: right;">Page 135</p> <p>1 who would then take custody? 2 A. The receptionist would have given 3 them to one of those three people whose 4 responsibility was to input trade confirmations. 5 Q. And so after the information was 6 input -- is that also the case with monthly 7 statements? 8 A. I think so, yes. 9 Q. So after the information was input 10 off of the confirmations and the monthly statements, 11 how was that information used by you in the back 12 office? 13 A. The information would be part of our 14 management information reporting system. So we 15 would have position sheets, we would have activity 16 reports, and we would have profit and loss 17 statements. 18 So that information, along with the 19 information from all the other brokers we dealt 20 with, would have been used either by me or other 21 accounting personnel to prepare financial 22 statements, to prepare performance reporting, to 23 prepare exposure-type reporting. All of the 24 accounting-type functions. 25 Q. Were those reports used in any manner</p>	<p style="text-align: right;">Page 137</p> <p>1 exposure is, the market value, the notional value, 2 things like that. 3 Q. And how is that report used by 4 yourself or Mr. Merkin? 5 A. From my standpoint, the amount of 6 exposure was used for financial statements, long 7 market value, short market value. Exposure was also 8 reflected in the quarterly letters that went out to 9 investors for Ariel and Gabriel. That's it. 10 Q. Specifically as to BLMIS, when the 11 reports show exposure, was it exposure to Mr. Madoff 12 as an investment adviser, or was it exposure to the 13 specific equities and options that he purportedly 14 traded on their behalf? 15 A. Well, it could be both. The 16 reporting could be for the Madoff account in total, 17 or it could show the exposure to a given security 18 within that account, or -- it would be both. 19 Q. Looking again at Exhibit 16, the 20 compensation summary, towards the bottom of that 21 list is listed Mr. Ezra Merkin. 22 A. Yes. 23 Q. Compensation for each year between 24 2000 and I guess 2006. Is that correct? Does this 25 accurately reflect all of the compensation</p>

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<p>1 sale there was a 9,000-dollar profit?</p> <p>2 MR. ANELLO: You're saying the first</p> <p>3 page reflects after the sale --</p> <p>4 MR. POWERS: I'm trying to tie them</p> <p>5 together.</p> <p>6 Q. Is this not the right transaction to</p> <p>7 tie this together?</p> <p>8 A. This could be one of the</p> <p>9 transactions. The proceeds of 1,771,000 would be</p> <p>10 part of the 9,000 -- would be part of the</p> <p>11 calculation to come up with the \$9,101 of proceeds.</p> <p>12 Q. Right. And it could be the entire</p> <p>13 methodology if there's nothing else reflected in</p> <p>14 this particular monthly statement of a transaction</p> <p>15 in that stock? Or no, because in fact it could have</p> <p>16 been in earlier purchase and sales of American</p> <p>17 Express?</p> <p>18 A. Correct.</p> <p>19 Q. So this is really a report that's for</p> <p>20 an annualized basis, cumulative over time?</p> <p>21 A. The P & L numbers are cumulative from</p> <p>22 whatever period. If it's the year-to-date, it's</p> <p>23 since January 1st. If it's quarterly, it's from the</p> <p>24 first day of the quarter. If it's monthly it's the</p> <p>25 first day of the month and if it's daily, it's that</p>	<p>1 discussed?</p> <p>2 A. I don't recall specifically.</p> <p>3 Q. Which account was being opened at</p> <p>4 that time?</p> <p>5 A. To my recollection it was the Gabriel</p> <p>6 account and an Ariel account.</p> <p>7 Q. Who was present?</p> <p>8 A. I went over to their offices with</p> <p>9 Mr. Merkin.</p> <p>10 Q. Anyone else present besides</p> <p>11 Mr. Madoff?</p> <p>12 A. I believe I met Frank DiPascali at</p> <p>13 that meeting.</p> <p>14 Q. Did he identify him, who</p> <p>15 Mr. DiPascali was?</p> <p>16 A. I don't recall specifically, but I</p> <p>17 knew that Mr. DiPascali would be the one I would be</p> <p>18 working with on kind of the back office things</p> <p>19 associated with the account.</p> <p>20 Q. When you next spoke -- excuse me, met</p> <p>21 with Mr. Madoff in November 2008, where was that?</p> <p>22 A. Where was it?</p> <p>23 Q. Yes.</p> <p>24 A. It was in the Madoff offices.</p> <p>25 Q. Who was present?</p>
Page 163	Page 165
<p>1 day.</p> <p>2 Q. So this would be reflective then, if</p> <p>3 you look at the second page of this P & L, of this</p> <p>4 exhibit, it shows that the only numbers have, under</p> <p>5 the market value column, treasuries, that the</p> <p>6 positions as of October 31st were all in treasury</p> <p>7 securities at that time. Do I understand now what</p> <p>8 this purports to represent?</p> <p>9 A. Right. The only positions that this</p> <p>10 report shows as of October 31st, 2000 would be a</p> <p>11 small Fidelity cash reserve amount and then</p> <p>12 treasuries.</p> <p>13 Q. Did you have any conversations with</p> <p>14 Mr. Merkin -- withdrawn.</p> <p>15 Did you say you have or have not</p> <p>16 spoken to Mr. Madoff?</p> <p>17 A. I've spoken to Mr. Madoff. I've been</p> <p>18 in a meeting with him.</p> <p>19 Q. How many different meetings?</p> <p>20 A. Two that I recall.</p> <p>21 Q. When?</p> <p>22 A. One was in the early 1990s when the</p> <p>23 account was first opened, and the next meeting that</p> <p>24 I recall was in November of 2008.</p> <p>25 Q. And in that first meeting what was</p>	<p>1 A. Mr. Merkin, Mr. Madoff and four</p> <p>2 representatives from one of Ascot's limited</p> <p>3 partners.</p> <p>4 Q. Which limited partner?</p> <p>5 A. Union Bank Privee.</p> <p>6 Q. What was the purpose of the meeting?</p> <p>7 A. The meeting was set up so that the</p> <p>8 people from UBP could meet and ask questions of</p> <p>9 Mr. Madoff.</p> <p>10 Q. Why was that set up for that purpose?</p> <p>11 A. Prior to the meeting the UBP people</p> <p>12 had requested some information regarding Ascot and</p> <p>13 Madoff in a letter to, I believe Mr. Merkin.</p> <p>14 Subsequent to that there was a call</p> <p>15 with the UBP people in which Mr. Merkin provided</p> <p>16 information and answered questions to them. At some</p> <p>17 point during that conversation Mr. Merkin offered to</p> <p>18 have them come, arrange a meeting with Mr. Madoff if</p> <p>19 they wanted to do that.</p> <p>20 Q. What information were they seeking</p> <p>21 from Mr. Madoff and Mr. Merkin?</p> <p>22 A. Sitting here I don't recall</p> <p>23 specifically. There were various questions that</p> <p>24 they had.</p> <p>25 Q. How long was the meeting?</p>

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<p>1 A. Couple of hours, two hours.</p> <p>2 Q. How much money did UBP itself or with</p> <p>3 its clients have invested in the funds?</p> <p>4 A. I don't know exactly.</p> <p>5 Q. Approximately?</p> <p>6 A. My recollection is they were, Ascot,</p> <p>7 either Ascot Partners or Ascot Fund combined, the</p> <p>8 largest investor. Again, I don't recall exactly.</p> <p>9 Several hundred million dollars.</p> <p>10 Q. What issues or concerns had they</p> <p>11 expressed -- withdrawn.</p> <p>12 Were you present when they expressed</p> <p>13 issues or concerns to Mr. Merkin with respect to the</p> <p>14 account and the use of Mr. Madoff and his firm?</p> <p>15 A. I'm not aware of any issues or</p> <p>16 concerns that they had. Again, they sent a letter</p> <p>17 asking questions.</p> <p>18 Q. But presumably they weren't satisfied</p> <p>19 with those answers and therefore that precipitated a</p> <p>20 meeting; would that be fair?</p> <p>21 A. I don't know if they were satisfied</p> <p>22 or not. There may have been questions that we</p> <p>23 couldn't -- Mr. Merkin or I couldn't answer.</p> <p>24 Q. Well, was that the case?</p> <p>25 A. I don't recall specifically.</p>	<p>1 respect to the option counterparties?</p> <p>2 A. They wanted to know whether or not</p> <p>3 the options were done over the counter or on</p> <p>4 exchanges, and just what sorts of -- I recall that</p> <p>5 he spoke about performance guarantees that he</p> <p>6 required of all his option counterparties.</p> <p>7 Q. And what did Mr. Merkin say about --</p> <p>8 excuse me. What did Mr. Madoff say about these</p> <p>9 comments?</p> <p>10 A. I recall he said he had a diverse</p> <p>11 group of 20 or so counterparties and that he did</p> <p>12 require certain performance guarantees from them.</p> <p>13 Q. Did he indicate what kind of</p> <p>14 guarantees?</p> <p>15 A. Not that I recall.</p> <p>16 Q. Did he indicate the names of the</p> <p>17 counterparties?</p> <p>18 A. Not that I recall.</p> <p>19 Q. Was he asked for the names?</p> <p>20 A. I'm not sure.</p> <p>21 Q. Do you have any reason to know why he</p> <p>22 didn't volunteer any of the names?</p> <p>23 A. No.</p> <p>24 Q. What else do you recall was discussed</p> <p>25 during that meeting on the topic of option</p>
Page 167	Page 169
<p>1 Q. So you don't recall whether or not it</p> <p>2 was because you didn't know the answers to the</p> <p>3 questions or whether or not they were unsatisfied</p> <p>4 with the answers?</p> <p>5 A. I don't recall them being unsatisfied</p> <p>6 with the answers. Again, I think Mr. Merkin offered</p> <p>7 to set up a meeting, a direct meeting between them</p> <p>8 and they accepted that.</p> <p>9 Q. Okay. What questions do you recall</p> <p>10 being asked by UBP?</p> <p>11 A. At the meeting?</p> <p>12 Q. At the meeting, yes. Thanks for</p> <p>13 clarifying that.</p> <p>14 MR. ANELLO: The meeting with Madoff?</p> <p>15 MR. POWERS: Yes. Thank you.</p> <p>16 A. I recall they asked about the option</p> <p>17 counterparties. That was discussed. They asked</p> <p>18 about the auditor of the Madoff firm. Again, I just</p> <p>19 don't recall other questions.</p> <p>20 Q. So those are the only two topics you</p> <p>21 recall, asking about the option counterparties and</p> <p>22 the auditor?</p> <p>23 A. Those are the only two I remember</p> <p>24 now.</p> <p>25 Q. What were they inquiring about with</p>	<p>1 counterparties?</p> <p>2 A. Nothing else comes to mind right now.</p> <p>3 Q. With respect to the auditor, what was</p> <p>4 UBP's issue on that?</p> <p>5 A. I don't know if they had an issue.</p> <p>6 They asked why he used the firm that he used. I do</p> <p>7 recall he said they had been the long-time auditors</p> <p>8 for his firm and that he felt the cost and level of</p> <p>9 service of some of the larger public accounting</p> <p>10 firms just wasn't worth it for him.</p> <p>11 Q. Did you have any follow-up --</p> <p>12 withdrawn.</p> <p>13 After the meeting were there other</p> <p>14 conversations you had, Mr. Merkin had with UBP</p> <p>15 concerning the topics discussed at the meeting?</p> <p>16 A. Did I have?</p> <p>17 Q. Um-hum.</p> <p>18 A. My follow-up was more in relation to</p> <p>19 proposed redemptions that UBP had for their</p> <p>20 investments in Ascot. After the meeting, they</p> <p>21 rescinded a large part of those redemption requests.</p> <p>22 So, my role was to just kind of effect those changes</p> <p>23 from the standpoint of revised requests and things</p> <p>24 like that.</p> <p>25 Q. Those requests to be effective when?</p>

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<p>1 A. December 31st, 2008.</p> <p>2 Q. Put it at least 45 days in advance in</p> <p>3 accordance with terms of the PPM?</p> <p>4 A. Correct.</p> <p>5 Q. What portion of -- well, you said a</p> <p>6 large portion. Do you recall if they rescinded all</p> <p>7 of that or not?</p> <p>8 A. No, they didn't. My recollection is</p> <p>9 that their original redemption request was for a</p> <p>10 very large percentage of their total investment.</p> <p>11 Q. Which was, approximately?</p> <p>12 A. Again, several hundred million</p> <p>13 dollars.</p> <p>14 Q. Several hundred million, 300 million?</p> <p>15 A. I believe more than that.</p> <p>16 Q. Okay, half a million?</p> <p>17 A. Probably less.</p> <p>18 Q. Okay. Thank you. Somewhere between.</p> <p>19 A. After the meeting and speaking to</p> <p>20 their operations people, I think they cut back their</p> <p>21 redemption requests by more than half.</p> <p>22 MR. MENNITT: I'm sorry, what was the</p> <p>23 answer; by more than half?</p> <p>24 THE WITNESS: By more than half.</p> <p>25 Q. And then you know on December 11th</p>	<p>1 A. Yes.</p> <p>2 Q. Do you know whose handwriting appears</p> <p>3 on this page?</p> <p>4 A. I believe it's -- I think it's Mike</p> <p>5 Achillarre's.</p> <p>6 Q. What is this reflective of?</p> <p>7 A. I believe the value of Ascot</p> <p>8 Partners -- Ascot Funds Madoff account at the end of</p> <p>9 the previous month was, he's saying it's 306 million</p> <p>10 990 and then on October 1st, I think this means that</p> <p>11 an additional 11,900,000 was put into the account.</p> <p>12 Q. Okay. Looking right above there,</p> <p>13 there are columns off to the middle of the page,</p> <p>14 talk about open/closed positions and market value,</p> <p>15 quarterly P & L, year-to-date P & L. There's the</p> <p>16 number 360 -- is that 367,360 dollars 902 dollars --</p> <p>17 let me start again. 367,360 -- let me start again.</p> <p>18 367 million 360,902 dollars. Do you see that?</p> <p>19 A. That's total market value. It looks</p> <p>20 like it's 357.</p> <p>21 Q. Okay. Your glasses are more</p> <p>22 effective than mine.</p> <p>23 That would be the current market</p> <p>24 value, right, consistent with what you said before?</p> <p>25 A. That would be the total of the</p>
Page 171	Page 173
<p>1 there was the confession, right? And did they</p> <p>2 receive any redemptions subsequent to the</p> <p>3 confession?</p> <p>4 A. No.</p> <p>5 Q. So none of their redemption requests</p> <p>6 were satisfied?</p> <p>7 A. There were no redemption proceeds</p> <p>8 sent out.</p> <p>9 Q. Was there ever any discussion raised</p> <p>10 by UBP or other investors as to why it was the</p> <p>11 monies that were placed at BLMIS were treasuries,</p> <p>12 appeared to be treasuries at the end of certain</p> <p>13 months? Going back to the exhibit.</p> <p>14 A. I do recall that UBP at the meeting</p> <p>15 with Mr. Madoff asked about how he timed his</p> <p>16 investments into the strategy and out of the</p> <p>17 strategy. I believe that was asked.</p> <p>18 Q. What was his response?</p> <p>19 A. I don't recall specifically, but,</p> <p>20 again, I think he described the strategy and</p> <p>21 explained that that was the key to his success, was</p> <p>22 coming up with the timing.</p> <p>23 Q. Looking at page 3 of this document,</p> <p>24 there appears to be handwriting. See where it says</p> <p>25 last month and then there's some numbers there?</p>	<p>1 open -- the market value, the total of the market</p> <p>2 value positions on this sheet. So I believe this</p> <p>3 speaks as of October 31st.</p> <p>4 Q. So these would just be the money</p> <p>5 market and the treasuries then, right?</p> <p>6 A. Yes.</p> <p>7 Q. And then quarterly P & L would be for</p> <p>8 the month, purportedly what was profit, right?</p> <p>9 714,000, correct?</p> <p>10 A. No. It would be the 4 million 884.</p> <p>11 The 714 was the P & L -- quarterly P & L only for</p> <p>12 the open positions, which would be the treasuries</p> <p>13 and the money market.</p> <p>14 Q. Right. Okay. So the year-to-date</p> <p>15 P & L would be reflective of what? 1,138,000.</p> <p>16 A. That would be the year-to-date P & L</p> <p>17 for the positions that were open as of this date.</p> <p>18 So the treasuries and...</p> <p>19 Q. And the closed ones which would</p> <p>20 include, for example, the American Express we talked</p> <p>21 about earlier, would be the next column and so in</p> <p>22 year-to-date there appears to be 37 million plus</p> <p>23 profit from those positions, correct?</p> <p>24 A. For that period for the positions</p> <p>25 that were open at some point during the period and</p>

<p style="text-align: right;">Page 174</p> <p>1 then were not open as of the end of the period. 2 Q. The period being from January 1 3 through October 31? 4 A. For the year-to-date column, yes. 5 Q. Yes, okay. And for a total P & L for 6 this Ascot Fund of approximately 38 million? Am I 7 reading it correctly? 8 A. For the year-to-date, yes. 9 (Autera Exhibits 102 through 106 10 marked for identification.) 11 Q. At this time have you looked at what 12 we've marked as Exhibit 102, which are monthly 13 statements for the period of February 2003; Exhibit 14 103, which are for the period of August 2004; 15 Exhibit 104 for the period of March 2006; 105 for 16 the period of September 2007; and 106 for the period 17 of November 2008. 18 I'm going to give them all to you to 19 take a look at it and generally authenticate that 20 that's what they are, if you would. I'm not going 21 to go into detail on each one of them. 22 (Comments off the record.) 23 Q. Can you generally identify these 24 documents, sir? 25 A. Again, without looking at every</p>	<p style="text-align: right;">Page 176</p> <p>1 his. 2 Q. Would it have been your practice to 3 check -- withdrawn. 4 How would you evidence -- withdrawn. 5 Did you review these from time to 6 time? 7 A. Yes. 8 Q. How frequently would you review 9 these? And by these I'm talking about the P & Ls 10 that came out, certainly weekly, monthly or daily. 11 A. I certainly would receive them daily. 12 From the standpoint of the monthly reporting, I 13 would review them monthly. 14 Q. So these are ones that appear to be 15 indicative of the monthly reporting? Are we right 16 about that? 17 A. They appear to relate to a month-end 18 period. 19 Q. Okay. And then if -- okay. And you 20 said that you then would review then these reports 21 for the month-ends for purposes of doing the 22 financial reporting? 23 A. Generally I would, yes. 24 Q. MFA is in quotes. What does MFA 25 stand for?</p>
<p style="text-align: right;">Page 175</p> <p>1 single page, they are either extracts or copies of 2 profit and loss reports from our management 3 information reporting system, GCC's management 4 information reporting system and monthly brokerage 5 statements received that reflect the given month 6 coming from Bernard L. Madoff Investment Securities. 7 And they're for different periods. 8 Q. And would the P & L be the similar 9 type, the columns and the calculations be similar to 10 the first one that we went through, would you say? 11 A. Yes. 12 Q. Let me turn just for a moment to some 13 handwriting on 102. It's document page 43 -- the 14 SEC number of 43338. 15 A. Okay. 16 Q. I just want to know if you're able to 17 identify for the record whose handwriting that is. 18 A. Again, it appears to be Mike 19 Achillarre's handwriting. 20 Q. The check marks? See the check marks 21 above that? 22 MR. ANELLO: You're asking who he 23 believes -- whose check marks those are? 24 Q. Take your counsel's question. 25 A. I'm not sure, but I assume they're</p>	<p style="text-align: right;">Page 177</p> <p>1 A. That's the internal designation that 2 we use in our internal management information 3 reporting system for the Ariel Fund account at 4 Madoff & Company. 5 Q. Thank you. 6 MR. POWERS: At this time I'm going 7 to ask the reporter to mark Exhibit 107. 107 8 appears to be a series of confirmations for the 9 Ascot account maintained at BLMIS for the period of, 10 starting from the period of I believe sometime in 11 1998 through 2008. There are approximately 453 12 confirmations. 13 (Autera Exhibit 107 marked for 14 identification.) 15 Q. I'm not going through every one of 16 these, but can you tell us what these appear to be, 17 sir? 18 A. These appear to be the trade 19 confirmations that we would receive from the Madoff 20 firm for activity done in the account that's 21 identified on the face of the confirmation. 22 Q. And from time to time would you look 23 through these? Not these particular ones, but 24 confirmations that came from BLMIS for any of the 25 three accounts?</p>

<p style="text-align: right;">Page 178</p> <p>1 A. At one point I would have done that 2 very early on. I would have been the one possibly 3 inputting into our system. But for the most part I 4 didn't necessarily look at trade confirmations that 5 came in. 6 Q. At what point was that, when you 7 would have been the one that looked at it and done 8 the input? 9 A. Very early on. 10 Q. What years are that, sir? 11 A. Probably 1990. I don't know when I 12 stopped. It would have been when Andrew Gordon was 13 hired and he took on responsibility for inputting. 14 Q. When was that, approximately? 15 A. The mid-'90s, early '90s. 16 Q. And you said for the most part you 17 wouldn't look at them but would you from time to 18 time look at the monthly statements -- excuse me, 19 confirmations? 20 A. I could. 21 Q. Would it be -- okay. 22 This is a -- the first document, 107 23 appears to be a confirmation for the Ascot Partners 24 Fund; you see that to the left? 25 A. Ascot Partners, LP, yes.</p>	<p style="text-align: right;">Page 180</p> <p>1 A. Yes. 2 Q. And it reflects a price of \$46.37, 3 correct? 4 A. Yes. 5 Q. The trade appears to be July 19, 6 2001. Do you see that, sir? 7 A. Yes. 8 Q. At that -- withdrawn. 9 Do you know what the settlement dates 10 are for stocks, securities transactions? 11 A. It's varied over the course of time. 12 Q. Let's start with since 1985. 13 A. I believe it's five days back then. 14 Q. What about 1995? 15 A. I'm not sure. 16 Q. What do you understand it to be 17 today, sir? 18 A. Depending on the security, it could 19 be two days. 20 Q. Stock, common stock. Traded on an 21 exchange in the United States of America, sir. Is 22 it your testimony that it could be two days? 23 A. I'm not sure. Next day settlement. 24 Q. Next -- 25 A. It could be.</p>
<p style="text-align: right;">Page 179</p> <p>1 Q. Right. For the purchase of Coca-Cola 2 securities, correct? 3 A. Ascot Partners was selling Coca-Cola. 4 Q. The "we" column, we bought, would be 5 reflective of the "we" being whom in this instance? 6 MR. ANELLO: Where are you? What's 7 your Bates number? 8 MR. POWERS: 48. 9 MR. ANELLO: I have a different Bates 10 number, 35. Oh, you have 48. I have 35. 11 MR. POWERS: You got it now. Turned 12 it over? 13 MR. ANELLO: Yup. 14 A. On the trade confirmations the "we" 15 is the broker-dealer, the Madoff broker-dealer. 16 Q. So they bought basically from Ascot 17 then? 18 A. Ascot sold. 19 Q. So would that -- and that would 20 indicate it was acting as a principal or as an agent 21 on that trade? 22 A. I'm not sure. 23 Q. But as you read it, you understood 24 this to be a sale by Ascot of whatever, 75,000 plus 25 shares of Coca-Cola, correct?</p>	<p style="text-align: right;">Page 181</p> <p>1 Q. Stocks, securities transactions you 2 understand have a settlement date of one day? 3 A. I'm not sure what they currently are. 4 Q. What about options? 5 A. Options are -- again, have changed, 6 but I think that's -- 7 Q. Let's use the period 2002 to the 8 present, sir. 9 A. I'm not sure. 10 Q. So I just want to be clear. You're 11 the CFO of Gabriel Capital Corp. You acknowledge a 12 part of your duties and responsibilities are to 13 monitor the activities, protect the assets of the 14 funds, and as you sit here now you're just not sure 15 how many days there are for the settlement of either 16 options or common stocks? 17 MR. ANELLO: I'm not sure that your 18 preamble, A, was necessary or, B, was accurate, but 19 do you have a question for him? 20 MR. POWERS: Yes. 21 Q. I just want to be clear, is it your 22 testimony as you sit here now that you are unaware 23 of what the settlement date is for common equity 24 securities on the United States exchanges? Is that 25 your testimony?</p>

EXHIBIT 92

FILED UNDER SEAL

EXHIBIT 93

FILED UNDER SEAL

Exhibit 94

PICARD v. MERKIN

DANIEL HESS

10/11/12

84	86
<p>1 A. Yes.</p> <p>2 Q. So you remember meeting him before</p> <p>3 or around 2001. Did you meet him at the offices</p> <p>4 of Gabriel Capital Corporation then?</p> <p>5 A. Yes.</p> <p>6 Q. How did you meet him there?</p> <p>7 A. He spent some time in the office,</p> <p>8 You know, he went on to start -- I believe it's</p> <p>9 Spring Mountain Capital. And I believe my letter</p> <p>10 to him was an attempt to try to raise some money.</p> <p>11 Q. Do you have any understanding of</p> <p>12 what he was doing there around 2001 at GCC?</p> <p>13 A. He had left Merrill Lynch and I</p> <p>14 believe was pondering starting a fund-to-funds or</p> <p>15 his own fund.</p> <p>16 Q. Did you have many discussions with</p> <p>17 him?</p> <p>18 A. Not a lot, but a couple of times.</p> <p>19 Q. So what's the purpose of this e-mail</p> <p>20 sent from you to Mr. Steffens, Ho and Mr. Merkin</p> <p>21 in December of 2006?</p> <p>22 A. This is basically trying to raise</p> <p>23 capital for Logik and just trying to show what a</p> <p>24 model portfolio would look like at the time, what</p> <p>25 our expected returns might be and try to woo him</p>	<p>1 confirmations that came into the company?</p> <p>2 A. Only trades that I might have done,</p> <p>3 you know. If something didn't clear properly,</p> <p>4 whatever, we would straighten that up. You had a</p> <p>5 couple of days to do that. Other than that, no.</p> <p>6 Q. Did you have day-to-day</p> <p>7 responsibilities to see if the trades did match?</p> <p>8 A. Yes. I was again the -- it was</p> <p>9 mostly done by the CFO and his guys. If</p> <p>10 something didn't match, they would let us know.</p> <p>11 Q. The CFO was Mr. Autera?</p> <p>12 A. Yes.</p> <p>13 Q. Who were his guys?</p> <p>14 A. He had Mark Weiner and Andrew</p> <p>15 Gordon.</p> <p>16 Q. So is it correct then that they</p> <p>17 primarily had the responsibility for looking at</p> <p>18 the trade confirmations?</p> <p>19 A. Yes.</p> <p>20 Q. When would you have involvement with</p> <p>21 them?</p> <p>22 A. If there was an error.</p> <p>23 Q. Do you recall any time when there</p> <p>24 was an error?</p> <p>25 A. Occasionally a commission might be a</p>
85	87
<p>1 into spending a little time with us and maybe</p> <p>2 invest with us.</p> <p>3 Q. Did Spring Mountain ever invest with</p> <p>4 you?</p> <p>5 A. No.</p> <p>6 Q. Did any of Mr. Merkin's funds ever</p> <p>7 invest with you?</p> <p>8 A. No.</p> <p>9 Q. At the time you were -- the document</p> <p>10 says soliciting investment from Spring Mountain</p> <p>11 and also Mr. Merkin, do you recall if either of</p> <p>12 them sent you any due diligence questionnaires to</p> <p>13 complete?</p> <p>14 A. I don't believe so.</p> <p>15 Q. Did they --</p> <p>16 A. I did go over and meet with</p> <p>17 Mr. Steffens in his office, but I don't believe</p> <p>18 we -- it went any farther than that.</p> <p>19 Q. Apart from personal meetings, was</p> <p>20 there any -- were there any steps that you would</p> <p>21 have characterized as due diligence that they</p> <p>22 performed on you?</p> <p>23 A. I don't believe so.</p> <p>24 Q. Going back to your time at GCC, did</p> <p>25 you have any involvement in the review of trade</p>	<p>1 little different or the price. There could be a</p> <p>2 discrepancy. And usually nothing big, but they</p> <p>3 couldn't clear unless you really had it down to</p> <p>4 the penny, so --</p> <p>5 Q. How often would you estimate that</p> <p>6 there would be that kind of a circumstance?</p> <p>7 A. Once or twice a week.</p> <p>8 Q. And what would you do then to</p> <p>9 address it?</p> <p>10 A. We would just confirm the price with</p> <p>11 whomever we did the trade with, or the quantity</p> <p>12 or the commission, whatever might be disputed,</p> <p>13 and try and settle it.</p> <p>14 Q. Would a new confirmation issue?</p> <p>15 A. I believe so.</p> <p>16 Q. Do you remember any time when one of</p> <p>17 those issues couldn't be resolved?</p> <p>18 A. No.</p> <p>19 Q. And again, was the purpose of that</p> <p>20 exercise to just compare and make sure the</p> <p>21 confirmation matched what the --</p> <p>22 A. With what we made, yes.</p> <p>23 Q. Did you consider that review of the</p> <p>24 trade confirmations to be due diligence?</p> <p>25 A. Not really.</p>

24 (Pages 84 to 87)

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DANIEL HESS

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<p style="text-align: right;">88</p> <p>1 Q. Did you conduct any analysis at GCC, 2 not just to see if the confirmations matched the 3 trade, but whether or not that trade was 4 possible? 5 A. Not to my . . . 6 Q. So specifically whether or not the 7 purported price was within the daily range of 8 reported prices? 9 I'm sorry, can we go back and -- I 10 want to ask this question again here. 11 Did you conduct any analysis at GCC, 12 not just to see if the confirmations matched the 13 trade, but whether or not the trade was possible? 14 A. Not to my knowledge. 15 Q. Either by yourself or Mr. Autera and 16 his staff or anyone else at GCC, do you know if 17 anyone compared those confirmations to see if the 18 purported prices -- 19 A. I don't -- no, I don't believe so, 20 but I'm not -- I'm not sure. 21 Q. Same question. 22 Was there any analysis to see if the 23 settlements were within the correct range 24 following the trade settlement dates? 25 A. I mean, like a bank debt trade,</p>	<p style="text-align: right;">90</p> <p>1 Q. Did anybody have responsibility for 2 creating those? 3 A. Creating the sheets? 4 Q. Yes. 5 A. They came through -- I believe it 6 was pretty automated. We'd get a sheet from Mike 7 or Mark or Andrew. 8 Q. What would you review it for? 9 A. Again, just to see if it was what -- 10 in line with what we thought the day's activity 11 might have been. 12 Q. Did you consider that review of 13 profit and loss statements relating to your 14 portion of the portfolio to be due diligence? 15 A. Not really. 16 Q. What did you consider it to be? 17 A. Again, more of a reconciliation than 18 probably due diligence. Again, looking more for 19 an error on a trade or a misprice or something. 20 Q. You said it came from Mr. Autera and 21 his group? 22 A. Yes. 23 Q. And he was the CFO? 24 A. Yes. 25 Q. The people working under him were</p>
<p style="text-align: right;">89</p> <p>1 something like this, might take a little bit 2 longer to clear. If there was some sort of 3 documentation attached to that. But, no, usually 4 most of these things closed within a certain time 5 frame. 6 There was not -- you had -- with 7 equities and options, you have a specific -- I 8 believe at the time it was trade date plus -- 9 might have been two or five days. With some 10 debt, it was a little bit more open-ended. But 11 for the most part, nothing ever -- 12 Q. So you don't recall there being any 13 kind of systemic review to make sure that those T 14 plus two or T plus five rules were being 15 followed? 16 A. No. 17 Q. During your time at GCC, did you 18 have any responsibility for creating or reviewing 19 profit and loss statements? 20 A. Not really. I mean, we got -- we 21 received the daily P&L and would review it, but 22 it was not, again, looking for -- I mean, for the 23 most part, you knew what happened that day. And 24 I guess if something was egregious, it would 25 stick it and you'd question it, but --</p>	<p style="text-align: right;">91</p> <p>1 accountants? 2 A. I believe so. 3 Q. Would it be accurate to say it was 4 more of an accounting exercise than due 5 diligence? 6 A. Correct. 7 MS. MOON: Objection. 8 BY MR. KITCHEN: 9 Q. Mr. Hess, can you identify for me 10 every discussion that you recall ever hearing 11 relating to Mr. Madoff or BLMIS? 12 A. I mean, specifically, no. 13 Q. Are there any -- 14 A. I guess throughout the years, you 15 know, some stories may have manifested, but I 16 really recall no -- you know, I do recall money 17 going to him and that being money we didn't have. 18 Specific conversations about him, I really -- I 19 really don't recall. It was a long time ago. 20 Q. I believe in -- earlier this morning 21 in your testimony, you referred to one discussion 22 you recall in the early '90s. Do you remember 23 any such discussion regarding Mr. Madoff? 24 A. Specifically, no. 25 Q. As to general discussions, do you</p>

25 (Pages 88 to 91)

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DANIEL HESS

10/11/12

<p style="text-align: right;">112</p> <p>1 difference between a hedge fund and an 2 SEC-regulated broker/dealer; is that right? 3 A. Yes. 4 Q. You also testified about money that 5 was allocated to outside money managers during 6 your time at GCC. 7 Do you remember that? 8 A. Yes. 9 Q. Would you agree that Mr. Teicher was 10 jealous of money allocated to other money 11 managers? 12 MR. KITCHEN: Objection to form. 13 THE WITNESS: Yes. 14 BY MS. MOON: 15 Q. And would you agree that part of 16 that was that he didn't have the opportunity to 17 earn fees on that money? 18 A. Exactly. 19 Q. And would you agree that in 20 Mr. Teicher's mind, there was no money manager 21 that was as good as Victor Teicher? 22 MR. KITCHEN: Objection to form. 23 THE WITNESS: I would agree with 24 that. 25</p>	<p style="text-align: right;">114</p> <p>1 October 11, 2012 2 I N D E X 3 WITNESS EXAMINATION BY PAGE 4 DANIEL HESS 5 6 MR. KITCHEN 5 7 MS. MOON 111 8 E X H I B I T S 9 TRUSTEE PAGE 10 11 Exhibit 43 No Bates numbers, Subpoena 10 12 Exhibit 44 Bates No. BS00307734, 28 13 Victor Teicher & Co., L.P. 14 Investment in Ariel 15 Capital, L.P. 1991 16 Exhibit 45 Bates Nos. BS00161789 59 17 through 199, Coast Event 18 Opportunities Fund October 19 2007 Presentation 20 Exhibit 46 Bates Nos. BS00160183 82 21 through 71, E-mail dated 22 12/7/06 from Hess to Merkin 23 with attachments 24 25</p>
<p style="text-align: right;">113</p> <p>1 BY MS. MOON: 2 Q. You were also asked some questions 3 about a daily P&L sheet while you were at GCC? 4 A. Yes. 5 Q. Would you agree that the review of 6 those sheets by others that were senior to you at 7 GCC was part of their oversight, monitoring and 8 diligence of your actions? 9 A. Yes. 10 MS. MOON: I don't think we have any 11 other questions. 12 MR. LAFFEY: I have no questions, 13 but reserve all rights. 14 MR. KITCHEN: Thank you. 15 MR. NEWCOMB: I have no questions. 16 MR. KITCHEN: Anyone else? 17 We have no further questions. 18 MR. JOSEPH: The deposition is 19 concluded. Thank you all very much. 20 THE VIDEOGRAPHER: Going off the 21 record. The time is 12:32. 22 23 24 25</p>	<p style="text-align: right;">115</p> <p>1 (Continued) 2 E X H I B I T S 3 4 Exhibit 47 Bates Nos. BS00261648 100 5 through 52, E-mail dated 6 1/20/09 from Schultz to 7 undisclosed recipients with 8 attachments 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

31 (Pages 112 to 115)

EXHIBIT 95

FILED UNDER SEAL

Exhibit 96

C O N F I D E N T I A L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Adv.Pro.No.
08-01789(BRL)

Debtor.

-----x
IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

Plaintiff,

Adv.Pro.No.
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.
-----x

DEPOSITION of ANDREW GORDON, as taken
by and before NANCY MAHONEY, Certified Court
Reporter, RPR and Notary Public of the States of New
York and New Jersey, at the offices of Baker &
Hostetler, 45 Rockefeller Plaza, New York, New York
on Monday, August 16, 2011, commencing at 10 a.m.

Page 10	Page 12
<p>1 Q. Other than the MBA, any post-graduate 2 courses of significance that you've taken? 3 A. No. 4 Q. And what is your current employment? 5 A. It's Marathon Asset Management, which 6 is at One Bryant Park. 7 Q. How long have you been with Marathon? 8 A. Since March of -- March of '08. 9 Q. And before Marathon, where were you 10 employed? 11 A. I was at Bear Stearns. If you 12 remember, March of '08 was a very interesting time 13 for Bear Stearns. 14 Q. What years were you at Bear Stearns? 15 A. I think it was '04 to '08. 16 Q. And before Bear Stearns? 17 A. I was unemployed for four months, 18 something like that, and I was at a place, Cathay 19 Financial. 20 Q. Cathay? 21 A. Cathay. 22 Q. C-a-t-h-a-y? 23 A. Yes. 24 Q. And what years were you at Cathay? 25 A. It was probably '01 to '04. I went</p>	<p>1 then I think there might be a Teicher & Co., or 2 something like that. There was a lot of different 3 entities. I know Victor went out to Carmel, or 4 something, was the name of one of his companies, but 5 I really don't -- I just remember working for 6 Gabriel. I don't -- 7 Q. But your recollection is you worked 8 for Gabriel Capital at the time? 9 A. Right, right. 10 Q. Okay. Let's just go over these jobs 11 a little bit. 12 At Chase Manhattan, what was your 13 position? 14 A. I was kind of like a staff 15 accountant, but really very, very junior, just kind 16 of -- it was almost like data entry, but I think 17 they called it staff accountant. Basically the 18 system did most of the accounting for us. So 19 input -- I was in the private banking area, so input 20 monthly transactions and ... 21 Q. And how about at Gabriel, you were 22 there for a long time, did you have one job or did 23 you have a series of jobs? 24 A. I had a series of jobs. I was hired 25 to do reporting, which was basically also inputting</p>
Page 11	Page 13
<p>1 from Gabriel to Cathay. 2 Q. Okay. And working backwards -- I 3 normally work forwards, I don't know why I'm going 4 backwards -- you were at Gabriel for what period of 5 time? 6 A. I think it was '92 to '01 in various 7 different jobs. 8 Q. And before Gabriel Capital, where did 9 you work? 10 A. I was at Chase Manhattan. 11 Q. What years? 12 A. So that was probably '90 to '92, 13 right -- right -- 14 Q. Right after graduation? 15 A. Yeah. 16 Q. Okay. When you said you were at 17 Gabriel Capital from '92 to '01, was that always 18 called Gabriel Capital or -- 19 A. I mean, it was a host of different 20 things. I primarily worked for Gabriel, but, you 21 know, in some various jobs. 22 Q. Is there a company called Victor 23 Teicher & Company, also? 24 A. Well, Victor was the portfolio 25 manager, so I had an interview with Victor. And</p>	<p>1 trades, making sure that the traders had -- you 2 know, basically if we bought a thousand shares of 3 IBM, we bought another thousand, the report the next 4 day says we have 2,000 IBM, whatever. 5 So they kind of know what we own, as 6 well as P&L, which is all done by the system. Then 7 I would take the report and put it on everybody's 8 desk that night, as well as do kind of a 9 reconciliation with the bank. 10 So if we did a trade, to make sure 11 that Morgan Stanley, who was our prime broker, would 12 know that we had 2,000 shares of IBM and the bank 13 knew we had -- so there was, you know, kind of 14 daily, you know, discussion to make sure that the 15 bank knew what our records showed. 16 Q. So make sure that what the trade 17 ticket showed was consistent with what the prime 18 broker showed? 19 A. Correct. 20 Q. Okay. And -- 21 A. Not necessarily -- you trade ticket 22 one, so then there's three people. You do a trade, 23 say Gabriel does a trade with Goldman Sachs and then 24 the shares go to Morgan Stanley. 25 So I have to make sure Goldman knows</p>

<p style="text-align: right;">Page 14</p> <p>1 the same trade that Gabriel knows, right, so the 2 counterbroker knows the same, and then at the end 3 make sure that Morgan Stanley knows and the total 4 amount is the same. 5 Does that make sense? 6 Q. As much as it's going to. 7 So this was in '92 when you were 8 hired? 9 A. Right. 10 Q. And you indicated you had some other 11 positions or other roles over the years. 12 A. During that earlier stage, I was 13 doing the same thing for -- it wasn't really the 14 same thing -- but for Madoff, also. It was 15 basically a five-minute kind of reconciliation. We 16 didn't do much. It was a very small amount. 17 Q. You indicated you were doing these 18 reconciliations. Who were those for? 19 A. The ones that I said before were 20 really for Gabriel was my primary job. 21 Q. But who was doing the trades, Gabriel 22 himself? 23 A. Yeah, Gabriel. 24 Q. So if Gabriel did the trades, you had 25 this reconciliation process you went through with</p>	<p style="text-align: right;">Page 16</p> <p>1 my role, I wanted to become -- I always wanted to be 2 a trader. 3 So once I started going back to 4 school, I was starting to have kind of a dual job, 5 some of the reconciliation, we had a couple of 6 people in the group, and eventually I transitioned 7 to become an analyst. 8 Q. Over what period of time did that 9 transition take place? 10 A. I mean, I talked about it forever, 11 but I think probably more -- I started probably '06, 12 '07 -- maybe '06 -- '06, '07, something like that. 13 Q. And when you were functioning as an 14 analyst, who were you doing the analysis for? 15 A. Guy by the name Elie Naufal. 16 Q. N-a-u-f-t-e-l? 17 A. I don't think there's a T. 18 Q. N-e-u-f-e-l? 19 A. Something like that, yeah. 20 MR. STEINER: I don't want to 21 interrupt. The witness just lost a decade. 22 THE WITNESS: I'm sorry, '96, so it 23 was -- the lost decade. I'm sorry. 24 A. So it was '92 to '96, not '06. 25 Q. So around '96 --</p>
<p style="text-align: right;">Page 15</p> <p>1 Morgan Stanley? 2 A. Right. 3 Q. If Madoff was doing trades, what did 4 you do? 5 A. So they would send me tickets -- I 6 don't know if they were tickets or confirmations, I 7 don't recall that, but they basically showed the 8 trade. And I would get them in stacks every month, 9 but that really didn't have anything to do with 10 Morgan Stanley. This was separate. 11 So, like I said, there was a lot of 12 different groups, a lot of different funds that we 13 managed at -- I call it Gabriel, but there was 14 Gabriel, there was Ariel, which is the offshore 15 vehicle, and then Madoff had their own -- kind of 16 like their own thing. 17 Q. So there was no Morgan Stanley 18 involved as far as the Madoff trades were concerned? 19 A. No. 20 Q. Because Madoff handled that aspect 21 himself? 22 A. Correct. 23 Q. Okay. And did your role at Gabriel 24 Capital evolve or change at some point? 25 A. Yeah. As I kind of, I guess, grew in</p>	<p style="text-align: right;">Page 17</p> <p>1 A. Around '96, I started -- 2 Q. -- is when you started working as an 3 analyst? 4 A. Again, that's my recollection. It 5 could have been '97. 6 Q. I understand these are approximate 7 dates. No one is going to hold you to them. 8 And Elie Naufal was -- he was making 9 trades? 10 A. So Victor had left, then I think 11 there was this other guy -- I can't think of his 12 name -- but he was basically the Victor, he was the 13 head portfolio manager at that time. 14 Q. All right. And previously Victor -- 15 that's Victor Teicher, correct? 16 A. Right. 17 Q. -- had managed the portfolio, the 18 assets for the various funds under the Merkin 19 umbrella? 20 A. I think it was just Gabriel. I mean, 21 there was probably a couple -- I don't recall, but 22 basically Gabriel was the biggest. 23 Q. The Gabriel fund? 24 A. Right. 25 Q. And how about Ariel fund?</p>

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<p>1 Q. -- to financial information, stock 2 prices, stock -- 3 A. No, there weren't Bloomburgs back 4 then. I mean -- no, my computer -- my main -- I 5 mean, I had access because the traders did, but I 6 didn't go there. I would really just sit at my desk 7 with my computer. It wasn't like feeds to Reuters 8 or any of that stuff. 9 Q. So if you wanted to know how much GE 10 stock sold on a given day, you could just hit a 11 couple buttons and get it on your computer? 12 A. No. I could get it from the traders, 13 but I couldn't just do it on my computer. 14 Q. Traders had the information, you 15 didn't? 16 A. Right. That's how most places were 17 back then. 18 Q. At any time when you were at Gabriel 19 Capital, were you ever asked to do anything to -- 20 other than reconciling trade tickets, were you ever 21 asked to do anything to investigate Madoff's 22 operations or BLMIS? 23 A. Investigate their operations? Like 24 do due diligence or something? 25 Q. To do due --</p>	<p>1 Q. Now, when you were involved in 2 reconciling trades, you explained to me earlier how 3 you would get information from Victor Teicher or his 4 people -- 5 A. Traders, yeah. 6 Q. -- and you would get information from 7 Morgan Stanley who would be, what, the prime broker? 8 A. Prime broker, yeah. 9 Q. And you would reconcile that 10 information? 11 A. Correct. 12 Q. From those two independent sources, 13 correct? 14 A. Correct. 15 Q. All right. Now, in terms of 16 Mr. Madoff, was there an independent source against 17 which you reconciled the information you got from 18 him? 19 A. No. I mean, there was BDO, right, 20 who audited, I think, at the end, but, no. 21 Basically I got the tickets, I would 22 put them in the system and then reconcile with their 23 month end statements. 24 Q. With Madoff's own month end 25 statements?</p>
Page 35	Page 37
<p>1 A. No. 2 Q. To do due diligence or to look into 3 anything involving the company? 4 A. No. 5 Q. Are you aware of anyone else at 6 Gabriel Capital while you were there who was 7 involved in due diligence on Madoff or investigating 8 any particular questions about his company? 9 A. I wouldn't have any idea. That 10 wouldn't be anything that I would know. 11 Q. When you were reconciling trades, was 12 Mr. Madoff the only portfolio manager who cleared 13 his own trades? 14 MR. STEINER: Objection to form. 15 A. I'm just trying to think where we did 16 Cerberus. I don't recall where Cerberus did it, and 17 so outside of Gabriel and Ariel and the main thing, 18 yes. 19 Q. Okay. And were there any sort of -- 20 A. Trying to think if Cerberus -- I 21 don't recall what Cerberus did. They had another 22 one, also -- I don't recall. There might have been 23 another fund, and I can't remember the name of that 24 one either. We had a lot of different funds at that 25 time, some small, some large.</p>	<p>1 A. Yeah, correct. 2 Q. Did you ever hear through the 3 grapevine or in any other way that the Ralph who 4 replaced you at Gabriel Capital had committed 5 suicide in early 2009? 6 A. I did. 7 Q. From whom did you hear that? 8 A. It could have only been Dan or Mark. 9 Q. Dan Hess -- 10 A. Right. 11 Q. -- or Mark -- 12 A. Mark Weiner. 13 Q. -- Mark Weiner? 14 A. It would have been one of those two. 15 I think it was Dan. 16 Q. And do you remember when you heard 17 about it, was it more or less at the time when it 18 took place or sometime later? 19 A. I don't recall, but I think it was 20 probably, you know, sometime soon after. 21 Q. What do you remember Dan telling you 22 about it? 23 A. I really don't. I don't know. I 24 mean, I know he said basically what you said. 25 Q. That Ralph had committed suicide?</p>

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<p>1 portfolio manager, did you have any conversations at 2 Gabriel Capital about that? 3 A. You know, I didn't. I didn't. I had 4 heard afterwards that he has very consistent 5 performance. 6 Q. From whom? 7 A. I don't -- you know, I've been 8 thinking about it since the -- whatever, the other 9 DA came in and, you know, asked similar questions. 10 I just remember hearing that -- that he had 11 consistent performance, but I don't remember when I 12 was there ever really talking about it, but I do 13 remember hearing that he had consistent performance. 14 But I'm just trying to think if it was during the 15 years that I was there or not. 16 Q. Did you do anything while you were 17 there at any time in terms of evaluating the 18 performance of the various portfolio managers? 19 A. No. 20 Q. Was there anyone who did that, to 21 your knowledge? 22 A. Not to my knowledge. I mean, I would 23 think it would -- you mean evaluate -- oh, 24 evaluate -- no, no, no, not me and I would not know 25 who would do that, but I surely didn't.</p>	<p>1 happens is you would get them in the mail, and I 2 just would figure that I didn't get them. 3 Q. Let me see if I understand this. 4 You said that there were some months 5 when the numbers wouldn't tie at the end of the 6 month. 7 What do you mean by that, the numbers 8 wouldn't tie? 9 A. So, you know, I would get my tickets 10 and put them in the system and you get a certain 11 amount. So then at the end of the month -- it 12 didn't happen too often, but every once in a while 13 it would happen where the numbers didn't tie to what 14 I was getting from the statement. 15 Q. So the daily tickets would not tie 16 with the monthly statement? 17 A. Right. 18 Q. Okay. And -- 19 A. I don't think that they're daily -- I 20 always thought of them as confirmations, but 21 whatever they were. 22 Q. The confirmations wouldn't tie -- 23 A. Right. 24 Q. -- with the monthly statement? 25 And you said you would call. Who</p>
Page 43	Page 45
<p>1 Q. Okay. During the time you were at 2 Gabriel Capital, did you ever hear anyone express 3 any concerns of any type about Madoff or Madoff's 4 operations? 5 A. No. 6 Q. How about Victor Teicher, did he ever 7 express concerns about Madoff? 8 A. No. I mean, not that I knew of. 9 Q. Right. We're just talking about what 10 you know. 11 A. Right. 12 Q. Did you, yourself, ever express 13 concerns regarding anything you saw in connection 14 with Madoff's operations? 15 A. No. 16 Q. Did you ever express concerns about 17 errors in any reports you received from Madoff? 18 A. I wouldn't say it's a concern, but I 19 think what you're alluding to is that I did -- every 20 so often my numbers wouldn't tie at the end of the 21 month and I would kind of wonder why. So I would 22 call, and there would be tickets or confirmations 23 that would make them tie. 24 So I thought that I was just missing 25 the tickets, somehow it got lost in the mail. What</p>	<p>1 would you call? 2 A. What's his name? 3 Q. Frank DiPascalli? 4 A. Yeah. 5 Q. So you call Frank DiPascalli who 6 worked for Madoff. And then what would happen, he 7 would get -- 8 A. We would try and figure out what 9 the problem -- I mean, things happened like that in 10 all the accounts that things didn't tie out. This 11 isn't a one -- so things didn't tie and then, you 12 know, I would get a ticket or would get tickets to 13 make the numbers tie. 14 So the tickets -- it would be like I 15 was missing confirmations somehow. 16 Q. Okay. So at the end of the month, 17 the monthly statement didn't tie with the tickets 18 that you would put into the system. You would call 19 Frank DiPascalli and then he would send you 20 additional -- 21 A. We would go and try and figure it 22 out, yeah. 23 Q. And then they would send you 24 additional tickets that would make the numbers tie? 25 A. Or maybe it was something that I did</p>

<p style="text-align: right;">Page 46</p> <p>1 that was wrong, but, either way, there were times 2 where I got tickets. 3 Q. And would these tickets be corrected 4 tickets from what you got previously or would they 5 be additional or supplemental tickets or might they 6 be either? 7 A. They would be supplemental tickets. 8 Q. And you said you also experienced 9 this not only with Madoff but also with some of the 10 other funds? 11 A. Yeah, generally it would be, you 12 know, the ticket was on the desk and maybe I didn't 13 get it in that hour or, you know, it was, you know, 14 just a daily course of events where we would -- 15 where numbers wouldn't tie, but generally they did. 16 Q. Let me ask: With regard to the other 17 funds, was there ever a situation in which they sent 18 you supplemental tickets to make the numbers tie 19 out? 20 A. Yes, but it would probably be because 21 for some reason I didn't get the ticket, but it 22 wasn't -- maybe it was on the desk and, you know, it 23 was never handed to me for some reason, but it would 24 get done pretty quickly. The next day, you would 25 get something in from Morgan Stanley saying, oh, we</p>	<p style="text-align: right;">Page 48</p> <p>1 basis. Like, I was getting the statement at the end 2 of the month, so I wouldn't know middle month if 3 there was an issue, right. 4 Q. So you get more to reconcile with 5 Madoff at the end of the month? 6 A. Yeah. I mean, it was -- yeah, it 7 was -- more to reconcile? 8 Q. I'm just trying to understand. I got 9 the sense that you were doing the other ones on a 10 daily basis? 11 A. Right. 12 Q. But with Madoff, you had to -- 13 A. It was on a monthly basis, right. 14 Q. Okay. So you had a bigger pile of 15 material to reconcile. 16 Is that right? 17 A. Yeah, but, I mean, as I got the 18 confirms, you know, I would put them in, right, so 19 it wasn't -- it wasn't a lot of work. It was pretty 20 easy to do. 21 Q. About how often would you have these 22 issues arise where -- 23 A. It wasn't often. 24 Q. Let me finish. 25 How often did you have these issues</p>
<p style="text-align: right;">Page 47</p> <p>1 did this extra trade, oh, it's on the blotter, but I 2 didn't get the ticket, so let's figure out, you 3 know, where it was and it got reconciled. 4 Q. Were the problems more frequent with 5 the Madoff account than with the other accounts? 6 A. I wouldn't say more frequent, but it 7 was just different because I was in the office with 8 the guys, so, you know -- I was really working for 9 the Gabriel account and it was easier to go to the 10 guys that were on the desk and say did you do these 11 trades. 12 Q. So with the Gabriel and Ariel 13 account, it was easier to get the people to verify 14 the information promptly? 15 A. I would just say that -- yeah, I 16 mean, with the other stuff, also, it was on a 17 monthly basis, right, so I'm kind of getting -- with 18 Madoff, I was getting it on a monthly basis, so I 19 was -- you know, you're getting it -- you're 20 reconciling every month, besides reconciling every 21 day or T plus five, you know, three or five days. 22 Q. So how is that different from what 23 you were doing with the in-house traders? 24 A. With the in-house traders, you're 25 reconciling more on a daily basis versus a monthly</p>	<p style="text-align: right;">Page 49</p> <p>1 arise where you needed to get supplemental trade 2 tickets from Madoff or the -- 3 MR. STEINER: Objection to form. 4 A. It wasn't often. How often? Twice a 5 year maybe, once a year, once or twice a year. 6 Q. Were these issues with the 7 reconciliation, were they typically very minor 8 numbers that needed to be reconciled, or were they 9 sometimes more substantial numbers? 10 A. I would say sometimes they were 11 bigger and sometimes they were smaller. It really 12 depended, but there were big numbers and small 13 numbers. Sometimes it was a big movement, sometimes 14 it was a small movement. 15 Q. Other than this issue you've 16 described with the trade tickets, did you ever 17 observe any other problems or express any other 18 concerns to anybody about any of the information you 19 received from Madoff? 20 MR. STEINER: Objection to form. 21 A. No, never. 22 Q. All right. And these issues with the 23 tickets, did you ever bring this to anyone's 24 attention? 25 A. Probably the first time that it</p>

EXHIBIT 97
FILED UNDER SEAL

EXHIBIT 98

FILED UNDER SEAL

Exhibit 99

C O N F I D E N T I A L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In Re:

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Adv.Pro.No.
08-01789(BRL)

Debtor.

-----x
IRVING H. PICARD, Trustee for the
Liquidation of Bernard L. Madoff
Investment Securities LLC,

Plaintiff,

Adv.Pro.No.
09-1182(BRL)

v.

J. EZRA MERKIN, GABRIEL CAPITAL,
L.P., ARIEL FUND LTD., ASCOT
PARTNERS, L.P., GABRIEL CAPITAL
CORPORATION,

Defendants.
-----x

DEPOSITION of JACK N. MAYER, as taken
by and before NANCY C. BENDISH, Certified Court
Reporter, RMR, CRR and Notary Public of the States
of New York and New Jersey, at the offices of
BAKER & HOSTETLER, 45 Rockefeller Plaza, New York,
New York on Tuesday, October 11, 2011, commencing at
10 a.m.

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<p>1 said.</p> <p>2 Q. What do you generally recall him</p> <p>3 saying?</p> <p>4 A. Generally, not agreeing.</p> <p>5 Q. What do you recall as to what he may</p> <p>6 have indicated or stated as to his general</p> <p>7 disagreement with Mr. Teicher's statement that this</p> <p>8 was a Ponzi scheme?</p> <p>9 MR. STEINER: Objection to form.</p> <p>10 A. I never said that Mr. Teicher said</p> <p>11 that it was a Ponzi scheme.</p> <p>12 Q. You used the phrase "could be a Ponzi</p> <p>13 scheme."</p> <p>14 A. Correct.</p> <p>15 Q. So we're affirming that that's the</p> <p>16 statement as best you recall, sir?</p> <p>17 MR. STEINER: Objection to form.</p> <p>18 A. Yes.</p> <p>19 Q. What did Mr. Merkin say generally, if</p> <p>20 anything, where he expressed his general</p> <p>21 disagreement with the fact -- this is the assertion</p> <p>22 by Mr. Teicher -- that Mr. Madoff could be running a</p> <p>23 Ponzi scheme?</p> <p>24 MR. STEINER: Objection to form.</p> <p>25 A. My general recollection is that he</p>	<p>1 A. I thought I answered that.</p> <p>2 Q. I want to make sure the record is</p> <p>3 absolutely clear.</p> <p>4 MR. VINEGRAD: What was the question?</p> <p>5 MR. STEINER: Objection to form.</p> <p>6 (Pending question read.)</p> <p>7 MR. VINEGRAD: You already said.</p> <p>8 MR. STEINER: Objection to form.</p> <p>9 A. I don't recall him saying anything</p> <p>10 beyond that.</p> <p>11 Q. Steadiness of returns is one thing</p> <p>12 you said, correct?</p> <p>13 A. Right.</p> <p>14 Q. And size is another thing?</p> <p>15 A. It's the combination of steadiness</p> <p>16 and size.</p> <p>17 Q. Size, what did you mean by size?</p> <p>18 Excuse me. Withdraw that.</p> <p>19 What did he mean by size?</p> <p>20 MR. STEINER: Objection.</p> <p>21 Q. As you understood it.</p> <p>22 A. I didn't say that he used the word</p> <p>23 "size."</p> <p>24 Q. But you did in your testimony a few</p> <p>25 moments ago.</p>
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<p>1 thought it was not.</p> <p>2 Q. Did Mr. Merkin state anything in</p> <p>3 particular as to why he thought it was not?</p> <p>4 A. I don't recall.</p> <p>5 Q. At any point in time thereafter,</p> <p>6 after this early conversation in the 1990s, did</p> <p>7 Mr. Merkin ever explain to you, any conversations</p> <p>8 ever, in writing or otherwise, as to why he thought</p> <p>9 it was not?</p> <p>10 A. The only thing that I can tell you</p> <p>11 about that is generally, over a period of years, I</p> <p>12 don't remember specifically when or why, this type</p> <p>13 of conversation would come up from time to time, and</p> <p>14 that, generally speaking, over the years, as</p> <p>15 Mr. Madoff continued to provide decent returns and</p> <p>16 as his enterprise had not blown up, there was a</p> <p>17 general sense that whatever suspicions or concerns</p> <p>18 there could be about him running a Ponzi scheme were</p> <p>19 lessened by the passage of time.</p> <p>20 Q. Lessened in the eyes of Mr. Merkin?</p> <p>21 A. And Mr. Teicher.</p> <p>22 Q. Did Mr. Teicher in this early</p> <p>23 conversation indicate the reasons, if any, he</p> <p>24 believed that Mr. Madoff could be running a Ponzi</p> <p>25 scheme?</p>	<p>1 A. If somebody is getting two percent</p> <p>2 returns annually, steadily -- I mean, he can do that</p> <p>3 by buying treasuries. So it's the combination of</p> <p>4 size and steadiness.</p> <p>5 Q. Oh, so the size of the returns?</p> <p>6 A. Yes.</p> <p>7 Q. Not necessarily the size of the</p> <p>8 portfolio or assets under management?</p> <p>9 MR. STEINER: Objection to form.</p> <p>10 A. Correct.</p> <p>11 Q. Anything else you recall being stated</p> <p>12 as a basis by Mr. Teicher as to why it could be a</p> <p>13 Ponzi scheme during that early time?</p> <p>14 MR. STEINER: Objection.</p> <p>15 A. I don't recall anything.</p> <p>16 Q. Did Mr. Merkin, during that time</p> <p>17 period, indicate what, if any, actions he had taken</p> <p>18 to assure himself or assuage himself that there</p> <p>19 was -- that everything that Madoff was doing was</p> <p>20 legitimate?</p> <p>21 A. I don't recall.</p> <p>22 Q. Did he ever do that for you?</p> <p>23 A. I don't recall.</p> <p>24 Q. When you say you don't recall, are</p> <p>25 you saying he may have or you're saying that you</p>

<p style="text-align: right;">Page 110</p> <p>1 A. Yes.</p> <p>2 Q. Following Mr. Madoff's arrest, did</p> <p>3 you have any conversations with anyone, apart from</p> <p>4 Mr. Balsam telling you of the exposure, concerning</p> <p>5 Mr. Madoff?</p> <p>6 MR. VINEGRAD: He's mindful of</p> <p>7 privilege.</p> <p>8 MR. STEINER: Right. I caution him</p> <p>9 not only with respect to his own privilege but with</p> <p>10 respect to GCC's privilege.</p> <p>11 MR. VINEGRAD: I understand. That's</p> <p>12 the one I was referring to.</p> <p>13 Q. Excluding any conversations with</p> <p>14 counsel or concerning advice of counsel, did you</p> <p>15 ever discuss Mr. Madoff following his arrest?</p> <p>16 A. Yes.</p> <p>17 Q. With who?</p> <p>18 A. I mean in a general sense, probably</p> <p>19 dozens of people.</p> <p>20 Q. Did you have discussions with</p> <p>21 Mr. Teicher?</p> <p>22 A. Yes.</p> <p>23 Q. What did he say?</p> <p>24 A. Mr. Teicher called me that night,</p> <p>25 December 11th, and, well, basically said words to</p>	<p style="text-align: right;">Page 112</p> <p>1 initial phone call, December 11th, what did you say?</p> <p>2 A. Very little.</p> <p>3 Q. What do you recall saying? Yes, you</p> <p>4 were right, I can't believe it, this is horrible</p> <p>5 news? You must have said something.</p> <p>6 MR. STEINER: Object to the form.</p> <p>7 A. I probably --</p> <p>8 Q. Your best recollection.</p> <p>9 A. My best recollection is that I said</p> <p>10 some things along those lines.</p> <p>11 Q. No, no, no.</p> <p>12 A. You're asking --</p> <p>13 MR. VINEGRAD: Please. What do you</p> <p>14 recall saying to Mr. Teicher during that call?</p> <p>15 That's the question.</p> <p>16 Q. Right. Your best recollection.</p> <p>17 A. My best recollection is generally</p> <p>18 just remarking what a terrible thing it was and how</p> <p>19 sad it was.</p> <p>20 Q. Anything else?</p> <p>21 A. And as I told you before, telling</p> <p>22 him, after he read me this email or repeated it to</p> <p>23 me in sum and substance, that I thought that he was</p> <p>24 being gratuitous and nasty.</p> <p>25 Q. Anything else?</p>
<p style="text-align: right;">Page 111</p> <p>1 the effect that, you know, I was right.</p> <p>2 Q. Did he feel vindicated?</p> <p>3 A. Well, he said that he felt he was</p> <p>4 right all along and he expressed thoughts in the</p> <p>5 direction of saying that Ezra was greedy and that's</p> <p>6 why he got into this mess.</p> <p>7 Q. Anything else?</p> <p>8 A. He said something about having sent</p> <p>9 Ezra an email, the details of which I don't recall</p> <p>10 other than my reaction to it as being, I thought,</p> <p>11 gratuitous and nasty.</p> <p>12 Q. When he said he was right all along,</p> <p>13 did he discuss any of the specific concerns he had</p> <p>14 had earlier?</p> <p>15 MR. STEINER: Objection to the form.</p> <p>16 A. I don't recall.</p> <p>17 Q. Did he discuss consistency of returns</p> <p>18 as to size of returns?</p> <p>19 A. I don't recall.</p> <p>20 Q. Besides that phone call, did you have</p> <p>21 any conversations with Mr. Teicher following the</p> <p>22 arrest?</p> <p>23 MR. POWERS: Excuse me.</p> <p>24 BY MR. POWERS:</p> <p>25 Q. When he said these things on the</p>	<p style="text-align: right;">Page 113</p> <p>1 A. Not that I recall.</p> <p>2 MR. POWERS: Thank you.</p> <p>3 BY MR. KITCHEN:</p> <p>4 Q. Did you make any response to his</p> <p>5 statement that he was right all along?</p> <p>6 MR. STEINER: Objection to form.</p> <p>7 A. I don't recall.</p> <p>8 Q. Following that conversation, did you</p> <p>9 have any other conversations with Mr. Teicher</p> <p>10 concerning Mr. Madoff?</p> <p>11 A. I vaguely recall one additional one</p> <p>12 but I don't recall details of that.</p> <p>13 Q. Do you remember when it was?</p> <p>14 A. Very soon thereafter.</p> <p>15 Q. Substantively was it any different</p> <p>16 than the first call?</p> <p>17 A. I have a vague sense of him</p> <p>18 acknowledging that he had been unduly nasty, but</p> <p>19 that's about it.</p> <p>20 Q. Do you have any recollection of what</p> <p>21 you said then, in that conversation?</p> <p>22 A. No.</p> <p>23 Q. Apart from Mr. Teicher, did you have</p> <p>24 any conversations with Mr. Merkin following</p> <p>25 Mr. Madoff's arrest?</p>